SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 85.

SUE ERSKINE NEWMAN, ADMINISTRATRIX OF THE ESTATE OF URSULA RAGLAND ERSKINE, DECEASED, WILLIAM G. McADOO, SECRETARY OF THE TREASURY, AND JOHN BURKE, TREASURER OF THE UNITED STATES, APPELLANTS,

vs.

IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS, TRADING AS MOYERS AND CONSAUL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

October Term, 1916.

SUE ERSKINE NEWMAN, ADMINISTRATRIX OF THE ESTATE of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,
vs.
IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS, trading as Moyers and Consaul.
} No. 3021.

Appeal from the Supreme Court of the District of Columbia.

Filed September 14, 1916.
Printed October 23, 1916.

Court of Appeals of the District of Columbia.

No. 3021.

SUE ERSKINE NEWMAN, etc., et al., appellants,
vs.
IDA M. MOYERS et al.

Supreme Court of the District of Columbia.

IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS trading as Moyers and Consaul, plaintiffs,
vs.
URSULA RAGLAND ERSKINE, WILLIAM G. MCADOO, SECRETARY of the Treasury of the United States, and John Burke, Treasurer of the United States, defendants.
} In Equity No. 33489.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill.

Filed June 7, 1915.

In the Supreme Court of the District of Columbia.

IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS, trading as Moyers and Consaul, plaintiffs,
v.
URSULA RAGLAND ERSKINE, WILLIAM G. MCADOO, Secretary of the Treasury of the United States, and John Burke, Treasurer of the United States, defendants.

In Equity No. 33489.

To the Honorable the Supreme Court of the District of Columbia, holding an Equity Court:

The bill of complaint of Ida M. Moyers and Charles F. Consaul, respectfully represents to the court:

2 1. That plaintiffs are citizens of the United States and residents of the District of Columbia, and bring this suit in their own right, as partners, trading under the firm name of Moyers and Consaul.

2. The defendant, Ursula Ragland Erskine, is a citizen of the United States, and a resident, as plaintiffs are informed and verily believe, of the county of Orange, State of Virginia.

The defendant, William G. McAdoo, is the Secretary of the Treasury of the United States, and is sued as such; that the defendant, John Burke, is the Treasurer of the United States, and is sued as such.

3. That from a time during the late Civil War, the defendant, Ursula Ragland Erskine, with her two coowners, to wit, her brothers, Edward M. Ragland and John D. Ragland, had a certain claim against the United States for just compensation for certain private property taken from them during said war by United States military forces, under proper authority; that on the fifteenth day of March, A. D. 1904, said defendant entered into a written contract with plaintiffs, reciting the employment of plaintiffs, as attorneys at law, and as the firm of Moyers and Consaul, to act as her attorneys in the matter of the prosecution of said claim; that at a later date and for the purpose of more specifically showing the fact that said defendant asserted said claim both in her own right, and also as an heir of her then deceased brother, John D. Ragland, said defendant entered into another contract with plaintiffs, of like import with that above mentioned; that in and by both of said contracts, said defendant did agree with plaintiffs, in consideration of their professional services in the matter of the prosecution of said claim, to pay them as a fee, a sum equal to fifty per centum (50%) of the amount collected upon said claim; that copies of both said contracts are hereto annexed, as Exhibits 1 and 2 to this bill, which exhibits plaintiffs pray may be taken and read as parts of this bill.

4. That pursuant to said employment, plaintiffs entered vigorously upon the prosecution of said claim; that plaintiff Charles F. Consaul went from the city of Washington, D. C., to the State of Alabama, taking with him a special commissioner of the Court of Claims, and did secure the testimony of witnesses in Alabama, in the month of August, 1904, at the expense of plaintiffs; that thereafter plaintiff Consaul did take the deposition of said defendant, Ursula Ragland Erskine, in said city of Washington; that thereafter plaintiff Ida M. Moyers did take the deposition of one important witness in the city of St. Louis, State of Missouri, all at the expense of plaintiffs. That after completion of all obtainable testimony, plaintiffs filed an abstract of all testimony, with various briefs, in the Court of Claims, and such further proceedings were had in said court so that on January 10, 1910, certain findings of fact, favorable to said claim, were filed by said court, which findings were certified to Congress; that a copy of said findings is hereto annexed as Exhibit No. 3 to this bill, which copy plaintiffs pray to be taken and read as a part of this bill.

5. That by act of Congress approved March 4, 1915 (Public act No. 289), an appropriation in the total sum of five thousand five
3 hundred and ten dollars ($5,510.00), was made in favor of said defendant Ursula Ragland Erskine, and her coclaimant, the share of said Ursula Ragland Erskine therein being an undivided one-third (⅓) or the sum of one thousand eight hundred and thirty-six dollars and sixty-six cents ($1,836.66). That in order to carry into effect said appropriation act, by the accounting officers of the Government, and at the request of said defendant, a Treasury warrant in the total sum of one thousand one hundred and two dollars ($1,102.00), being a sum equal to twenty per centum (20%), of said entire claim so appropriated for, has been drawn, or is about to be drawn, payable to plaintiffs, and is about to be delivered to plaintiffs, and which warrant, when received by plaintiffs, will be received on account of their agreed attorney fee, but without waiver of their right to demand and receive the remainder of their said agreed fee.

6. That a further warrant has been drawn, or is about to be drawn, by the accounting officers of the Treasury Department, payable to said Ursula Ragland Erskine, for the sum of one thousand four hundred and sixty-nine dollars and thirty-three cents ($1,469.33), being her one-third share of said total claim, less a sum equal to twenty per centum (20%) thereof.

7. That said defendant, Ursula Ragland Erskine, has refused to pay or to assent to pay to plaintiffs any sum on account of said agreed fee, save and except said sum equal to twenty per centum (20%) of her interest in said claim, and has in effect stated to plaintiffs that said sum is the only sum which she is willing to pay to plaintiffs.

8. That the sole ground for the refusal of said defendant to pay the full sum agreed to be by her paid to plaintiffs, is the fact that in

said act of Congress approved March 4, 1915 (Public Act No. 289), are contained the following provisions:

"SEC. 4. That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered or advances made in connection with said claim.

"It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold, or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000."

9. That plaintiffs are informed and believe, and therefore so allege, that said provisions in said act of Congress attempting to restrict fees of attorneys as aforesaid, any contract to the contrary notwithstanding, and after their services contracted for had been rendered, are invalid and unconstitutional, in that they deprive plaintiffs of their liberty of contract and of their property and property rights, without due process of law, in direct contravention of the
4 terms of the fifth amendment to the Constitution of the United States.

10. That in event said warrant for the sum of one thousand four hundred and sixty-nine dollars and thirty-three cents ($1,469.33) is delivered to said defendant, Ursula Ragland Erskine, said sum will be converted by her to her own use; that plaintiffs, if compelled to proceed against said defendant in an action at law, will be defrauded of their rightful lien and claim upon said fund, and are unaware of the ownership by said defendant of any property subject to execution.

11. That by reason of the premises and of their professional services so rendered by plaintiffs as aforesaid, and by reason of the terms and effect of said contracts, plaintiffs became and are entitled to have paid them by said defendant, Ursula Ragland Erskine, the further sum of five hundred fifty-one dollars ($551.00) in addition to the sum represented by the Treasury warrant about to be drawn to plaintiffs by the Treasury Department, and are entitled to have a lien upon the fund about to be paid to said defendant and on any warrant which may be issued in payment of said claim or any part thereof to said defendant.

12. That plaintiffs are without any plain and adequate and complete remedy at law.

Wherefore, the premises considered, plaintiffs pray:

I.

That process may issue out of this honorable court, directed to the said defendant, Ursula Ragland Erskine, and to said defend-

William G. McAdoo, as Secretary of the Treasury of the United States, and to said defendant, John Burke, as Treasurer of the United States, commanding them and each of them, to appear and make answer to this bill of complaint, but not under their respective oaths, answer under oath by each and all of said defendants being hereby expressly waived, and to abide by and perform the orders and decrees of this court in the premises.

II.

That said defendant, Ursula Ragland Erskine, be perpetually enjoined from applying for, demanding, or receiving from the Government of the United States or from any officer thereof, including the defendants, William G. McAdoo and John Burke, or their subordinates, any warrant, draft, or check for the payment of said sum of one thousand four hundred and sixty-nine dollars and thirty-three cents ($1,469.33), or any part thereof.

III.

That the defendant, William G. McAdoo, as Secretary of the Treasury of the United States, and the defendant, John Burke, as Treasurer of the United States, and their successors in office, may be enjoined from issuing any warrant, draft, or check payable to said defendant, Ursula Ragland Erskine, for said sum of one thousand four hundred and sixty-nine dollars and thirty-three cents ($1,469.33), or any part thereof.

IV.

That a receiver be appointed by this honorable court, with authority to demand and receive from the United States, and from said defendant, William G. McAdoo, as Secretary of the Treasury, as aforesaid, and from said defendant, John Burke, as Treasurer, as aforesaid, and their successors in office, the payment of said sum, and to receipt for the same, and to retain same in his possession to await the further order of the court.

V.

That a rule may issue herein against said defendant, Ursula Ragland Erskine, directing her to show cause, on or before a certain day, why she should not be restrained and enjoined from applying for, demanding, or receiving from the United States or any officer thereof any warrant, draft, or check in payment of said sum or any part thereof.

VI.

That a rule may issue herein against the defendants, William G. McAdoo, as Secretary of the Treasury, and John Burke, as Treas-

urer, as aforesaid, and each of them, directing them and each of them to show cause on or before a certain day why they and each of them should not be restrained by a preliminary injunction or restraining order from issuing any warrant, draft, or check to said defendant, Ursula Ragland Erskine, for payment of said sum of one thousand four hundred and sixty-nine dollars and thirty-three cents ($1,469.33) or any part thereof.

VII.

That this court will determine and decree that plaintiffs are entitled to recover from defendant, Ursula Ragland Erskine, said sum of five hundred fifty-one dollars ($551.00), in addition to the sum of twenty per centum of said entire claim, so about to be paid to plaintiffs by the Treasury Department of the United States, or a total sum equal to fifty per centum (50%) of the sum appropriated for the payment of the share of said defendant in and to said claim; and that it be decreed that plaintiffs have an equitable lien on said claim.

VIII.

Plaintiffs further pray such other and general relief in the premises as to this honorable court shall seem meet and proper and as the exigencies of the case may require.

IDA M. MOYERS,
CHAS. F. CONSAUL,
Partners Trading under the firm name of Moyers and Consaul, Plaintiffs.

MOYERS & CONSAUL,
Attorneys for Plaintiffs.

6 DISTRICT OF COLUMBIA, *ss:*

Charles F. Consaul, being first duly sworn according to law, deposes and says: I have read the foregoing bill of complaint and know the contents thereof; that the statements therein made and contained as of plaintiff's own knowledge, affiant knows to be true; that those made upon information and belief affiant believes to be true.

CHAS. F. CONSAUL.

Subscribed and sworn to before me this 7th day of June, A. D. 1915.

[SEAL.]

WALTER C. ENGLISH,
Notary Public, D. C.

EXHIBIT 1.

Know all men by these presents that I, Ursula Ragland Erskine & Edward M. Ragland, minor heirs of the estate of George O. Ragland, deceased, have employed Moyers & Consaul, of Washington,

D. C., as our attorneys to prosecute our claim against the U. S. Government for property taken by the Federal forces during the late Civil War, claim against the U. S. Government, and in consideration of his professional services and expenses incurred by him in the prosecution of said claim I hereby agree to allow him a fee of fifty per cent of the amount which may be collected thereof, and said fee is hereby made a lien on any draft that may be issued in payment of said claim.

Witness my hand and seal this fifteenth day of March, 1904. [189]* *19—*. URSULA R. ERSKINE.
19—.

Witnessed by
S. E. MCGREGOR,
BESSIE EDHOLM.

EXHIBIT 2.

Fee agreement.

This memorandum of agreement, witnesseth: That I, Ursula Ragland Erskine, of Huntsville, Ala., heir of George Orville Ragland and of John D. Ragland, deceased, have employed Moyers & Consaul, of Washington, D. C., and each of them as my attorneys to prosecute my claim against the Government of the United States for property taken from me and my co-owners by U. S. military forces during the Civil War, being pending case No. 12837 Cong., in the Court of Claims, and any continuation of said claim, and in consideration of their professional services in the prosecution of said claim I hereby agree to pay them as a fee a sum equal to fifty per cent (50%) of the amount which may be collected upon said claim, said fee to be a lien on any warrant that may be issued in payment of said claim.

Witness my hand this 26th day of April, 1907, in the county of Madison, State of Alabama.

URSULA RAGLAND ERSKINE.

Witness to signature:
A. R. ERSKINE.

EXHIBIT 3.

The court, upon the evidence adduced, and after considering the briefs and arguments of counsel on both sides, makes the following

Findings of fact.

I.

The claimants herein, Edward M. Ragland, Mrs. Ursula Ragland Erskine, and the decedent, John D. Ragland, were loyal to the Government of the United States throughout the late civil war by reason of their tender years.

[*Figures enclosed in brackets erased in copy.]

II.

During said war military forces of the United States by proper authority, took for the use of the army from the claimants and the decedent in Madison County, Ala., property of the kind and character described in the petition, which at the time and place of taking was reasonably worth the sum of five thousand five hundred and ten dollars ($5,510), for which no payment appears to have been made.

III.

The claim herein was never presented to any officer or department of the Government prior to its presentation to the Fifty-eighth and Fifty-ninth Congresses and subsequent reference to this court as hereinbefore set forth in the statement of this case, and no satisfactory reason is adduced showing why the claim was not earlier presented.

Rule to show cause.

Filed June 7, 1915.

* * * * * * *

Upon consideration of the bill of complaint of Ida M. Moyers and Charles F. Consaul, filed herein on the 7th day of June, A. D. 1915, it is this 7th day of June, A. D. 1915, ordered, that William G. McAdoo, as Secretary of the Treasury of the United States, and John Burke, as Treasurer of the United States, and each of them, show cause in this court, on or before the 25th day of June, A. D. 1915, at 10 o'clock a. m., why they and each of them, should not be restrained and enjoined from issuing any warrant, check, draft or order to Ursula Ragland Erskine, in payment of her interest or share in the claim of said Ursula Ragland Erskine and her co-claimant, as appropriated for by act of Congress approved March 4, 1915 (Public Act No. 289), or any part thereof, Provided, that a copy of this order be served upon said William G. McAdoo, Secretary of
8 the Treasury, and said John Burke, Treasurer of the United States, and each of them, on or before the 11th day of June, A. D. 1915.

WALTER I. McCOY, *Judge.*

Marshal's return.

Served a copy of the within order on W. G. McAdoo, and John Burke, personally June 7, 1915.

MAURICE SPLAIN, *Marshal.*
S.

Motion to dismiss.

Filed December 11, 1915.

* * * * * * *

Now comes the defendant, William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, by John E. Laskey, Esquire, United States attorney in and for the District of Columbia, and move the court to dismiss the bill of complaint herein, for the causes following:

One. That the provisions of section 4 of the act of March 4, 1915 (Public—No. 289—63d Congress), the constitutionality of which is drawn in question by the plaintiffs' bill, were enacted in pursuance of a power vested by the Constitution of the United States in Congress, and are constitutional and valid, and, therefore, binding upon the plaintiffs.

Two. That the situs of the fund in the plaintiffs' bill described, and as to a portion of which fund the plaintiffs pray that an equitable lien may be decreed in their favor, is not within the jurisdiction of the court.

Three. That the court is without jurisdiction to restrain the action of defendants McAdoo and Burke in disbursing the fund described in the plaintiffs' bill.

Four. That it is manifest, upon the face of plaintiffs' bill that the defendants McAdoo and Burke have no individual interest in the controversy between the plaintiffs and defendant Ursula Ragland Erskine, or in the suit by plaintiffs' bill instituted, and that the relief sought against defendants McAdoo and Burke is in their official capacity only, as representatives of the Government of the United States, which alone is to be affected by any decree sought herein, wherefore the said suit is essentially and substantially a suit against the United States and the property thereof, and is beyond the jurisdiction of the court.

JOHN E. LASKEY,
United States Attorney, D. C.

Moyers and Consaul, attorneys for plaintiffs:

You will please take notice that above motion will be calendared for hearing on Friday, the 17th day of December, 1915.

JOHN E. LASKEY,
United States Attorney, D. C.

I hereby certify that I mailed a copy of the foregoing motion to Moyers and Consaul, Washington, D. C., December 11, 1915.

MABRY C. VAN FLEET.

Amended bill of complaint.

Filed June 13, 1916.

* * * * * * *

To the honorable the Supreme Court of the District of Columbia:

The amended bill of complaint of Ida M. Moyers and Charles F Consaul, now filed by leave of the court, respectfully represents:

1. That plaintiffs are citizens of the United States and residents of the District of Columbia, and bring this suit in their own right, a partners engaged in the practice of law and trading under the firm name of Moyers and Consaul.

2. That the defendant, Sue Erskine Newman, as plaintiffs are informed and believe, is a citizen of the United States and a resident of the county of Orange, State of Virginia; that she is the duly appointed, qualified, and acting administratrix of the estate of her deceased mother, Ursula Ragland Erskine, who was an original party defendant to this suit, but who has died during the pendency of this suit.

That the defendant, William G. McAdoo, is the Secretary of the Treasury of the United States, and is here sued as such; that the defendant, John Burke, is the Treasurer of the United States, and is here sued as such.

3. That from a time during the late Civil War, the decedent, Ursula Ragland Erskine, with her two co-owners, to wit, her brothers, Edward M. Ragland and John D. Ragland, had a certain claim against the United States for just compensation for certain private property taken from them during said war by United States military forces, under proper authority, and for public use; that on or about the fifteenth day of March, A. D. 1904, said decedent, Ursula Ragland Erskine, entered into a written contract with plaintiffs, reciting the employment of plaintiffs, as attorneys at law, and as the firm of Moyers and Consaul, to act as her attorneys in the matter of the prosecution of said claim; that at a later date, to wit, on or about the twenty-sixth day of April, A. D. 1907, and for the purpose of more specifically showing the fact that said decedent asserted said claim both in her own right and also as an heir of her then deceased brother, John D. Ragland, said decedent entered into another contract with plaintiffs of like import with that above mentioned; that in both of said contracts said decedent did agree with plaintiffs in consideration of their professional services in the matter of the prosecution of said claim, to pay them as a fee a sum equal to fifty per centum (50%) of the amount collected upon said claim; that copies of said contracts are hereto annexed, as Exhibits 1 and 2 to this amended bill of complaint, which exhibits plaintiffs pray may be taken and read as parts of this bill.

10 4. That pursuant to said employment, plaintiffs entered vigorously upon the prosecution of said claim; that plaintiff, Con

saul, went from the city of Washington, District of Columbia, to the State of Alabama, taking with him a special commissioner of the Court of Claims, and there acting with counsel representing the United States, did, in the month of August, A. D. 1904, secure the depositions of various witnesses in proof of said claim, all at the sole expense of plaintiffs herein; that thereafter plaintiff, Consaul, acting with counsel representing the United States, did take the deposition of said decedent, Ursula Ragland Erskine, in said city of Washington, at the sole expense of plaintiffs herein; that thereafter, plaintiff, Ida M. Moyers, acting with counsel representing the United States, did take the deposition of one important witness in the city of St. Louis, State of Missouri, at the sole expense of plaintiffs herein. That after securing all obtainable testimony, plaintiffs prepared and filed in the Court of Claims an abstract of all said testimony, with various briefs, and such further proceedings were taken and had in said court that on January 10, 1910, certain findings of fact, in the nature of an award or allowance in the matter of said claim, were filed by said Court of Claims, which findings on motion in that behalf made by plaintiffs herein were certified to Congress; that a copy of said findings, allowance, or award is hereto annexed as Exhibit No. 3 to this bill, which copy plaintiffs pray may be taken and read as part of this bill.

5. That after said certification of said findings to Congress said claim remained pending before Congress without final action for a period of more than five years; that by act of Congress approved March 4, 1915 (38 Stats. L., 962–963), an appropriation in the total sum of five thousand five hundred and ten dollars ($5,510.00) was made in favor of said decedent, Ursula Ragland Erskine, and of her co-claimants, the share of said Ursula Ragland Erskine therein being one-third, or the sum of one thousand eight hundred and thirty-six and 66/100 dollars ($1,836.66). That in order to carry into effect said act of Congress, as construed by them, the accounting officers of the United States will, unless restrained by the order of this honorable court, issue to the defendant, Sue Erskine Newman, as administratrix of the estate of said Ursula Ragland Erskine, a warrant in the sum of one thousand four hundred and sixty-nine and 33/100 dollars ($1,469.33), being eighty per centum (80%) of the one-third share of said defendant in the total sum so appropriated; and will proceed to also issue to plaintiffs herein a warrant for the sum of three hundred sixty-seven and 33/100 dollars ($367.33), on account of their attorney fee in the matter of said claim, same being twenty per centum (20%) of said one-third share of said defendant in said total sum so appropriated.

6. That said defendant, Sue Erskine Newman, as administratrix of the estate of said decedent, Ursula Ragland Erskine, has declined and now declines and refuses to pay to plaintiffs, on account of the attorney fee claimed by them under said contracts hereinbefore referred to, any sum in excess of twenty per centum (20%), of said one-third

share in said total sum appropriated; that the sole ground
11 for defendant's refusal to pay to plaintiffs the full sum agreed
to be paid by her said decedent to plaintiffs as per said contracts hereinabove referred to, is the fact that in said act of Congress approved March 4, 1915 (38 Stats. L., 962–996), are contained the following provisions:

SEC. 4. That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.

It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold, or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of *of* this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000."

7. That said defendant, Sue Erskine Newman, administratrix of the estate of said Ursula Ragland Erskine, deceased, after personal examination of said contracts above mentioned, admits them to be genuine, but asserts that she is advised that, in view of the terms of said section 4 of said act of Congress above set forth, she is prohibited by law from fulfilling the terms of said contracts so made by her decendent with plaintiffs herein, although she is willing so to do.

8. That plaintiffs are informed and believe, and therefore so allege, that said above-quoted provisions of said act of Congress, attempting to restrict the fees of attorneys, any contract to the contrary notwithstanding, and enacted after plaintiffs had rendered their services contracted to be rendered in the matter of the prosecution of said claim, are invalid and unconstitutional, in that their operation would be to deprive plaintiffs of their liberty to enforce the terms of a contract with said decedent, which contract was valid when made and whereunder the consideration had passed from plaintiffs by performance of their services, prior to said enactment; and also in that the operation of said enactment would deprive plaintiffs of their property and property rights, without due process of law; all in contravention of the terms of the fifth amendment to the Constitution of the United States; as has been held and adjudged by this honorable court in the suit at law (At Law No. 57944) brought by plaintiffs herein against Thomas Fahey.

9. That in event said warrant for the sum of one thousand four hundred and sixty-nine and 33/100 dollars ($1,469.33) is issued and delivered to the defendant, Sue Erskine Newman, as administratrix of the estate of Ursula Ragland Erskine, deceased, the sum represented by said warrant will become general assets or funds of said estate, and plaintiffs, if compelled to proceed against said

plaintiff by an action at law, will therefore be deprived of their rightful equitable lien and claim upon said fund for satisfaction of their claim or demand for payment of the attorney fee
12 contracted to be paid to them, and will be compelled to submit their said claim or demand upon a plane of equality with other possible general creditors of the estate of said decedent, contrary to the contemplation and intent of the parties to said fee contracts; all to the probable irreparable loss of plaintiffs herein.

10. That by reason of the premises, and of their professional services rendered by plaintiffs as aforesaid, and by reason of and under the terms of said contracts, plaintiffs became entitled and are now entitled, to have and recover from the defendant, Sue Erskine Newman, as administratrix of the estate of Ursula Ragland Erskine, deceased, the sum of nine hundred and eighteen and 33/100 dollars ($918.33), and are entitled to have an equitable lien upon the fund about to be paid to said defendant, and upon any warrant which may be issued in payment of said claim or any part thereof, to said defendant.

11. That plaintiffs are without any plain, adequate, and complete remedy at law.

Wherefore, the premises considered, plaintiffs pray:

I.

That process may issue out of this honorable court, directed to said defendant, Sue Erskine Newman, as administratrix of the estate of Ursula Ragland Erskine, deceased, and to said defendants, William G. McAdoo, as Secretary of the Treasury, and John Burke, as Treasurer of the United States, commanding them and each of them, to appear and make answer to this bill of complaint, but not under oaths, answer under oath being hereby expressly waived, and to abide by and to perform the orders and decrees of this court in the premises.

II.

That the defendant, Sue Erskine Newman, as administratrix of the estate of Ursula Ragland Erskine, deceased, be perpetually enjoined from applying for, demanding, or receiving from the Government of the United States or from any officer thereof, any warrant, draft, check, or order for payment of said sum of one thousand eight hundred thirty-six and 66/100 dollars ($1,836.66), or any part thereof.

III.

That the defendant William G. McAdoo, as Secretary of the Treasury of the United States, and the defendant John Burke, as Treasurer of the United States, and their successors in office, may be enjoined from issuing any warrant, draft, check, or order, payable to

said defendant, Sue Erskine Newman, administratrix of the estate of Ursula Ragland Erskine, deceased, for said sum of one thousand eight hundred and thirty-six and 66/100 dollars ($1,836.66), or any part thereof.

13

IV.

That a receiver be appointed by this honorable court with authority to demand and receive from the United States Government and from defendant William G. McAdoo, as Secretary of the Treasury, and from defendant John Burke, as Treasurer of the United States, and from their successors in office, the payment of said sum of one thousand eight hundred and thirty-six and 66/100 dollars ($1,836.66) and to retain same in his possession to await the further order of the court, or that defendants McAdoo and Burke be directed by order of the court to pay said sum into the registry of this court, to be there held to await the further orders of the court.

V.

That a rule may issue herein against defendant Sue Erskine Newman, administratrix of the estate of Ursula Ragland Erskine, deceased, directing her to show cause, on or before a certain day, why she should not be restrained and enjoined from applying for, demanding, or receiving from the United States, or from any officer thereof, any warrant, draft, check, or order in payment of said above-named sum, or any part thereof.

VI.

That a rule may issue herein against defendants William G. McAdoo, as Secretary of the Treasury, and John Burke, as Treasurer aforesaid, and each of them, directing them and each of them to show cause, on or before a certain day, why they and each of them should not be restrained by preliminary injunction or restraining order from issuing any warrant, draft, check, or order to said defendant Sue Erskine Newman, administratrix of the estate of said Ursula Ragland Erskine, deceased, in payment of said sum of one thousand eight hundred and thirty-six and 66/100 dollars ($1,836.66), or any part thereof.

VII.

That this court will determine and decree that plaintiffs are entitled to have and recover from defendant Sue Erskine Newman, as administratrix of the estate of Ursula Ragland Erskine, deceased, the sum of nine hundred and eighteen and 33/100 dollars ($918.33), with costs and that it be decreed that plaintiffs have an equitable lien upon said fund now in the hands of the defendants William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States

VII.

Plaintiffs further pray such other and general relief in the
14 premises as to this honorable court shall seem meet and proper and as the exigencies of the case may require.

IDA M. MOYERS,
By CHAS. F. CONSAUL,
Attorney in Fact;
CHAS. F. CONSAUL,
Plaintiffs.

MOYERS & CONSAUL,
Attorneys for Plaintiffs.

DISTRICT OF COLUMBIA, *ss:*

Charles F. Consaul, being first duly sworn according to law, deposes and says that he has read the foregoing bill of complaint and knows the contents th'reof; that the statements therein made are true to the best of his knowledge, information, and belief; that affiant's coplaintiff, Ida M. Moyers, is now outside the District of Columbia, to wit, in the State of California.

CHAS. F. CONSAUL.

Subscribed and sworn to before me this 13th day of June, A. D. 1916.

[SEAL.] FRANK E. ELDER,
Notary Public.

(Endorsed:) Leave to file granted June 13, 1916. Wendell P. Stafford, justice.

NOTE.—Exhibits numbered 1, 2, and 3 attached to the amended bill of complaint are the same as those which are part of the original bill, to be found on pages 10–11 of this transcript of record.

Suggestion of death of defendant Ursula Ragland Erskine.

Filed June 19, 1916.

* * * * * * *

Now comes Sue Erskine Newman, by her attorney, John Lewis Smith, and informs the court that on, to wit, the 15th day of August, 1915, the defendant Ursula Ragland Erskine, lately a citizen of the United States and of the Commonwealth of Virginia, a resident of the town of Gordonsville, county of Orange, in the Commonwealth of Virginia, and while a resident of and domiciled in said county and Commonwealth, departed this life, intestate, in said county and Commonwealth, on the 15th day of August, 1915, leaving certain heirs at law and next of kin*d*, and that thereafter, on the 22nd day of November, 1915, upon proper application unto the Probate Court in said county of Orange, in said Commonwealth of Virginia, a court of com-

petent jurisdiction in the premises, said Probate Court did gra
letters of administration upon the personal estate of the sa
15 named defendant Ursula Ragland Erskine, and thereby a
pointed Sue E. Newman the administratrix thereof, who du
qualified as such, as will more fully and at large appear by a cert
fied copy of said letters of administration upon said estate, whic
is hereto annexed and hereby made part hereof, and motion
hereby respectfully made for an order of this court substituting t
said Sue E. Newman, administratrix as aforesaid, as party defend
in this cause in the room and stead of the aforesaid Ursula Ragla
Erskine, deceased defendant.

SUE ERSKINE NEWMAN,
By JOHN LEWIS SMITH,
Her Attorney.

VIRGINIA:

In the clerk's office of the Circuit Court of the county of Orange.

I, C. W. Woodfolk, clerk of the Circuit Court of Orange Coun
do hereby certify that on the 22nd day of November, 1915, Mrs. S
Erskine Newman duly qualified in my said court as administrat
of Ursula Ragland Erskine and gave bond as such according to la
Given under my hand (and seal) this 3rd day of February, 19
[L. S.] C. W. WOODFOLK, *Clerk.*

Order of substitution.

Filed June 19, 1916.

* * * * * * *

On consideration of the motion of Sue Erskine Newman, infor
ing the court that defendant Ursula Ragland Erskine, departed t
life, intestate, on August 15, 1915; and of the certificate of the cle
of the Circuit Court of Orange County, Virginia, showing that
November 22, 1915, Sue Erskine Newman duly qualified in said co
as administratrix of the Estate of Ursula Ragland Erskine; it is,
the court, this 19th day of June, 1916, ordered, that the said Sue
Newman, as administratrix of the estate of the said Ursula Ragla
Erskine, deceased, be, and she is hereby substituted as party defe
ant in this cause in the room and stead of the said Ursula Ragla
Erskine, deceased, with leave to said administratrix to file such ple
ing in this cause as she may be advised.

WENDELL P. STAFFORD, *Justice.*

We consent to the passage of the foregoing order:

JOHN E. LASKEY,
United States Attorney in and for the
District of Columbia,
Attorneys for Defendants McAdoo and Burke
By JAMES B. ARCHER, *Assistant*

Motion of Sue Erskine Newman, Adm'r'x, to dismiss bill.

Filed June 19, 1916.

* * * * * * *

Now comes the defendant Sue Erskine Newman as admintratrix f the estate of Ursula Ragland Erskine, by her attorney John Lewis mith, and moves the court to dismiss the amended bill of complaint rein, for the causes following:

One. That the provisions of section 4 of the act of March 4, 1915 Public—No. 289—63d Congress), the constitutionality of which is wn in question by the plaintiffs' bill, were enacted in pursuance f a power vested by the Constitution of the United States in Con- ess, and are constitutional and valid, and, therefore, binding upon e plaintiffs.

Two. That the situs of the fund in the plaintiffs' bill described, d as to a portion of which fund the plaintiffs pray that an equitable n may be decreed in their favor, is not within the jurisdiction of e court.

Three. That the court is without jurisdiction to restrain the action defendants McAdoo and Burke in disbursing the fund described in e plaintiffs' bill.

Four. That it is manifest, upon the face of plaintiffs' bill, that the fendants McAdoo and Burke have no individual interest in the troversy between the plaintiffs and defendant Ursula Ragland rskine, or in the suit by plaintiffs' bill instituted, and that the re- f sought against defendants McAdoo and Burke is in their official pacity only, as representatives of the Government of the United ates, which alone is to be affected by any decree sought herein, herefore the said suit is essentially and substantially a suit against e United States and the property thereof, and is beyond the juris- tion of the court.

JOHN LEWIS SMITH,
Attorney for Sue Erskine Newman, Administratrix.

yers & Consaul, attorneys for plaintiffs.

You will please take notice that above motion will be calendared hearing on Friday, the 16th day of June, 1916.

JOHN LEWIS SMITH,
Attorney for Sue Erskine Newman, Administratrix.

ervice of a copy of the foregoing is accepted this 13th day of e, 1916.

MOYERS & CONSAUL,
Attorneys for Plaintiffs.

17 *Motion of Wm. G. McAdoo & John Burke to dismiss*

Filed June 19, 1916.

* * * * * *

Now come the defendants, William G. McAdoo, Secretar
Treasury, and John Burke, Treasurer of the United States,
E. Laskey, Esquire, United States attorney in and for the
of Columbia, and move the court to dismiss the amended
complaint herein, for the causes following:

One. That the provisions of section 4 of the act of March
(Public, No. 289, 63d Congress), the constitutionality of
drawn in question by the plaintiff's bill, were enacted in pur
a power vested by the Constitution of the United States in C
and are constitutional and valid, and, therefore, binding u
plaintiffs.

Two. That the situs of the fund in the plaintiff's bill d
and as to a portion of which fund the plaintiffs pray than a
able lien may be decreed in their favor, is not within the
tion of the court.

Three. That the court is without jurisdiction to restrain th
of defendants McAdoo and Burke in disbursing the fund d
in the plaintiff's bill.

Four. That it is manifest, upon the face of plaintiff's b
the defendants McAdoo and Burke have no individual int
the controversy between the plaintiffs and defendant Ursula
Erskine, or in the suit by plaintiffs' bill instituted, and t
relief sought against defendants McAdoo and Burke is i
official capacity only, as representatives of the Government
United States, which alone is to be affected by any decree
herein, wherefore the said suit is essentially and substan
suit against the United States and the property thereof,
beyond the jurisdiction of the court.

JOHN E. LASKEY
United States Attorney,

Moyers & Consaul, attorneys for plaintiffs:

You will please take notice that above motion will be ca
for hearing on Friday, the 16th day of June, 1916.

JOHN E. LASKEY
United States Attorney,

Service of a copy of the foregoing is accepted this 13th
June, 1916.

MOYERS & CONSAU
Attorneys for Pla

Decree.

Filed June 19, 1916.

* * * * * *

his cause coming on to be heard upon the motions of the defend- William G. McAdoo, *John Burke and* Sue Erskine Newman, as inistratrix of the estate of the defendant Ursula Ragland ine, to dismiss the amended bill of complaint, upon the grounds forth in said motions, and after arguments of counsel for the ective parties, and consideration thereof by the court, it is by court, this 19th day of June, 1916, ordered, that said motions, each of them, be and they hereby are overruled, to which ruling of the defendants, by their respective counsel, notes an ex- ion; and said defendants and each of them hereby electing not e answer to the amended bill of complaint, but each of said ndants electing to stand upon their respective motions to dismiss amended bill of complaint, the court now proceeds to enter a decree herein; and it is accordingly by the court adjudged, or- and decreed as follows:

That the defendants William G. McAdoo, as Secretary of the asury of the United States, and John Burke, as Treasurer of the ted States, do forthwith pay into the registry of this court, the of eighteen hundred and thirty-six and 66/100 dollars ,836.66), being the undivided one-third share of the defendant, Erskine Newman as administratrix of the estate of Ursula Rag- Newman, deceased, in that certain item of appropriation con- ed in the act of Congress approved March 4, 1915 (38 Stat. L., -963), reading as follows, to wit:

"To Edward M. Ragland, Ursula Ragland Erskine and Edward Ragland, as administrator of John D. Ragland, deceased, heirs George Orville Ragland, deceased, of Madison County, $5,510,"

that upon the payment of said sum of eighteen hundred and ty-six and 66/100 dollars ($1,836.66) into the registry of the rt, as aforesaid, the said defendants William G. McAdoo as Sec- ary of the Treasury of the United States, and John Burke as asurer of the United States, and each of them, shall be fully dis- rged and released in respect thereto and each of them shall go e without day.

That the plaintiffs Ida M. Moyers and Charles F. Consaul, ners, trading as the firm of Moyers and Consaul, do have and ver of and from the defendant, Sue Erskine Newman as ad- inistratrix of the estate of Ursula Ragland Erskine, deceased, sum of nine hundred and eighteen and 33/100 dollars ($918.33), the costs of this cause, to be taxed by the clerk, and the clerk this court is hereby authorized and directed to pay to the said

plaintiffs the said sum of nine hundred and eighteen and 33/100 dollars ($918.33), and said costs, out of the aforesaid sum of eighteen hundred and thirty-six and 66/100 dollars, hereinbefore directed to be deposited into the registry of this court; and after the payment by the clerk to the plaintiffs of the sum last aforesaid, the net amount remaining, less the statutory commission on the amount deposited in the registry of this court, payable to the clerk of this court, shall be paid by the clerk of this court to Sue Erskine Newman, as administratrix of the estate of Ursula Ragland Erskine.

WENDELL P. STAFFORD, *Justice.*

From the foregoing decree, the defendants and each of them, by their respective counsel, hereby note an appeal in open court, to the Court of Appeals of the District of Columbia, and on motion of said defendants the amount of the bond on said appeal is hereby fixed in the sum of one hundred dollars ($100), which shall operate as a supersedeas.

WENDELL P. STAFFORD, *Justice.*

Memoranda.

July 10, 1916.—Appeal bond approved and filed.

July 14, 1916.—Time for filing transcript of record in the Court of Appeals extended until and including the 15th day of September 1916.

Designation of record on appeal.

Filed July 20, 1916.

* * * * * * *

The clerk of the court will please prepare the transcript of the record in this cause, for the Court of Appeals of the District of Columbia, and include therein the following papers of record:

1. Original bill of complaint.
2. Rule to show cause against the defendants.
3. Motion of defendants McAdoo and Burke to dismiss the original bill of complaint.
4. Amended bill of complaint.
5. Suggestion of death of defendant Ursula Ragland Erskine.
6. Order substituting Sue Erskine Newman, adm'r'x for defendant Ursula Ragland Erskine.
7. Motion of defendant Sue Erskine Newman, adm'r'x, to dismiss amended bill of complaint.
8. Motion of defendants McAdoo and Burke to dismiss amended bill of complaint.
9. Final decree entered June 19, 1916, overruling motions to dismiss, defendants electing to stand on their motions to dismiss; and directing defendants McAdoo and Burke to pay certain sum into

gistry of the court; appeal noted in open court and allowing me, and fixing amount of bond.

10. Memo. approval and filing bond on appeal.

11. Memo. all orders extending time to file transcript.

12. Assignment of errors.

13. This designation of record.

JNO. LEWIS SMITH,
Attorney for Defendant Sue Erskine Newman, Adm'r'x.
JOHN E. LASKEY,
Attorney for Defendants McAdoo and Burke.

Service of the foregoing designation of record, a carbon copy hereof having been served upon the undersigned, is hereby acknowledged this 19th day of July, 1916.

MOYERS & CONSAUL,
Attorneys for Plaintiff.

Assignment of errors.

Filed September 14, 1916.

* * * * * * *

The trial court erred as follows:

One. In holding that the provisions of section 4 of the act of Congress (Public, No. 289, 63d Congress) entitled "An act making appropriation for payment of certain claims in accordance with findings of the Court of Claims, reported under the provisions of the acts approved March third, eighteen hundred and eighty-three, and March third, eighteen hundred and eighty-seven, and commonly known as the Bowman and the Tucker Acts, and under the provisions of section numbered one hundred and fifty-one of the act approved March third, nineteen hundred and eleven, commonly known as the Judicial Code," are in violation of the fifth amendment to the Constitution of the United States, and that, therefore, the provisions of said section 4 are unconstitutional, null, and void.

Two. In refusing to hold that the provisions of section 4 of the act of Congress (Public, No. 289, 63d Congress) entitled "An act making appropriation for payment of certain claims in accordance with findings of the Court of Claims, reported under the provisions of the acts approved March third, eighteen hundred and eighty-three, and March third, eighteen hundred and eighty-seven, and commonly known as the Bowman and the Tucker Acts, and under the provisions of section numbered one hundred and fifty-one of the act approved March third, nineteen hundred and eleven, commonly known as the Judicial Code," were and are constitutional and valid.

Three. In holding that the situs of the fund in plaintiffs' bill described, and as to a portion of which the plaintiffs claim an equitable lien, is within the jurisdiction of the court.

Four. In refusing to hold that the situs of the fund in plaintiffs' bill described .. not within the jurisdiction of the court.

Five. In holding that the court had jurisdiction to restrain the action of the defendants McAdoo and Burke, as Secretary of
21 the Treasury, and Treasurer of the United States, respectively, in disbursing the fund described in the plaintiffs' bill of complaint.

Six. In refusing to hold that the court was without jurisdiction to restrain the action of the defendants McAdoo and Burke, as Secretary of the Treasury, and Treasurer of the United States, respectively, in disbursing the fund described in the plaintiffs' bill of complaint.

Seven. In not holding that upon the face of the plaintiffs' bill the defendants McAdoo and Burke have no individual interest in the controversy between the plaintiffs and the defendant Ursula Ragland Erskine, and that the relief sought against defendants McAdoo and Burke is in their official capacity only, as representatives of the Government of the United States, which alone is to be affected by any decree sought therein, whereby the said suit is essentially and substantially a suit against the United States and beyond the jurisdiction of the court.

Eight. In not holding that the plaintiffs' suit is in effect one against the United States, and, therefore, beyond the jurisdiction of the court.

Nine. In not sustaining the motions of the defendants to dismiss plaintiffs' bill of complaint.

Ten. In requiring the defendants McAdoo and Burke, as Secretary of the Treasury, and Treasurer of the United States, respectively, to pay into the registry of the court the sum of eighteen hundred thirty-six dollars and sixty-six cents ($1,836.66), and further erred in decreeing that the plaintiffs are entitled to recover of the defendant Sue Erskine Newman, administratrix, the sum of nine hundred eighteen dollars and thirty-three cents ($918.33), and the costs of this suit.

Eleven. In holding that the plaintiffs were entitled to recover more than twenty per centum (20%) of the fund in controversy, in the event it shall be held that the court had jurisdiction of the subject matter of this suit.

Twelve. In entering the final decree now appealed from.

JOHN LEWIS SMITH,
Attorney for Defendant Sue Erskine Newman, Adm'x.
JOHN E. LASKEY,
Attorney for Defendants McAdoo and Burke.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to

30, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 33489 in equity, wherein Ida M. Moyers and Charles F. Consaul, partners, &c., are plaintiffs and Ursula Ragland Erskine et al. are defendants, as the same remains upon the files and of record in said court.

22 In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 14th day of September, 1916.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

(Endorsed on cover:) District of Columbia Supreme Court. No. 3021. Sue Erskine Newman, etc., et al., appellants, vs. Ida M. Moyers et al. Court of Appeals, District of Columbia. Filed Sep. 14, 1916. Henry W. Hodges, clerk.

23 THURSDAY, *October 4th, A. D. 1917.*

SUE ERSKINE NEWMAN, ADMINISTRATRIX OF THE ESTATE of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,

vs.

IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS, trading as Moyers and Consaul.

No. 3021.

The argument in the above entitled cause was commenced by Mr. M. C. Van Fleet, attorney for the appellants, and was continued by Messrs. C. F. Consaul and J. W. Bailey, attorneys for the appelles, and was concluded by Mr. M. C. Van Fleet, attorney for the appellants.

24 Court of Appeals of the District of Columbia.

SUE ERSKINE NEWMAN, ADMINISTRATRIX OF THE Estate of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,

v.

IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS, trading as Moyers and Consaul, appellees.

No. 3021.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the court:

Appellees, plaintiffs below, and hereafter referred to as such, filed a bill in equity wherein it was averred that by a written con-

tract dated April 26, 1907, Ursula Ragland Erskine employed plaintiffs as her attorneys at law to prosecute her claim against the United States Government for compensation for private property taken from her and her co-owners by the United States military authorities during the Civil War. The contract is as follows:

"This memorandum of agreement, witnesseth: That I, Ursula Ragland Erskine, of Huntsville, Ala., heir of George Orville Ragland and of John D. Ragland, deceased, have employed Moyers & Consaul, of Washington, D. C., and each of them as my attorneys to prosecute my claim against the Government of the United States for property taken from me and my co-owners by U. S. military forces during the Civil War, being pending case No. 12,837, Cong., in the Court of Claims, and in continuation of said claim, and in consideration of their professional services in the prosecution of said claim, I hereby agree to pay them as a fee a sum equal to fifty per cent (50 per cent) of the amount which may be collected upon said claim, said fee to be a lien on any warrant that may be issued in payment of said claim.

"Witness my hand this 26th day of April, 1907, in the county of Madison, State of Alabama.

"(Signed) URSULA RAGLAND ERSKINE.

"Witness to signature:

"A. R. ERSKINE."

Plaintiffs aver in the bill that they diligently prosecuted the claim to judgment in the Court of Claims, and after certification of the findings of the court to Congress, where they lay for several years awaiting action, Congress, by act of March 4, 1915 (38 Stats. L., 962), appropriated the total sum of $5,510 in satisfaction of the claims of Mrs. Erskine and her two co-claimants, being the amount found due by the Court of Claims. After the bill was filed, and while the case was awaiting trial, Mrs. Erskine died, and defendant, Sue Erskine Newman, was duly substituted as administratrix of her estate. Plaintiffs pray that process issue; that defendant Newman be enjoined from receiving from the United States Government a warrant for the sum of $1,836.66, being the share of the appropriation belonging to Mrs. Erskine; that defendants McAdoo and Burke be restrained from paying the same; that a receiver be appointed; that McAdoo and Burke be directed to pay said sum of money into the registry of the court to await the further orders of the court; that a rule issue requiring defendants to show cause why injunction should not issue; that a decree be entered to the effect that plaintiffs are entitled to recover from defendant Newman the sum of $918.33 (being 50 per cent of the share of Mrs. Erskine), with costs, and that plaintiffs be decreed to have an equitable lien upon said fund, and for general relief.

Defendants filed a motion to dismiss the bill, which, on hearing, was denied; and, defendants refusing to further plead, a decree was entered requiring that defendants McAdoo and Burke pay the

amount into the registry of the court, as prayed; that, upon compliance with the order, they be dismissed without day; that plaintiffs have and recover from the defendant Newman the full amount claimed, with costs; that they be paid the same by the clerks of the court out of the money so deposited, and that the balance be paid over to defendant Newman.

All the averments of the bill as to the making of the contract and the performance of the services by plaintiffs are admitted by the motion to dismiss. The sole question reserved by this appeal is the constitutionality of section 4 of the act of Congress making the appropriation in question, which provides: "That no part of the amount of any item appropriated in this bill in excess of 20 per centum thereof shall be paid or received by any agent or agents, attorney or attorneys on account of services rendered or advancements made in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds 20 per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provi-
25 sions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000." It will be observed that this act expressly prohibits the receipt by attorneys of any amount greater than 20 per cent of the sum appropriated, whether payment be made from such or any other fund, and, therefore, it impliedly prohibits the claimant from paying in any manner, for services rendered a sum greater than that specified in the act.

The validity of plaintiffs' contract is not questioned. Indeed, such contracts have the express sanction of law. R. S. U. S., sec. 823. Similar contracts have been upheld frequently by the courts. Wylie v. Coxe, 15 How., 415; Taylor v. Bemiss, 110 U. S., 42; Nutt v. Knut, 200 U. S., 12; McGowan v. Parish, 237 U. S., 285; Roberts v. Consaul, 24 App. D. C., 551. In the latter case this court said:

"Persons having claims against the United States that must be collected through proceedings in the Court of Claims are practically compelled, in the majority of cases, to employ attorneys and contract with them for fees contingent upon success. Such contracts are not unlawful and may be enforced according to their terms where fair and reasonable. Taylor v. Bemiss, 110 U. S., 42."

The claim of Mrs. Erskine was for the value of property taken by the United States military forces during the Civil War. It therefore constituted a valid, subsisting debt of the Government. While it is true that the sovereign can not be sued except by its consent, such consent was given in this instance and a tribunal was designated to which the claimant could resort to have her rights adjudicated. Suit was brought in the Court of Claims under what is known as the Tucker Act (24 Stats. L., 505). The case was there prosecuted by plaintiffs pursuant to their contract, and the amount due from

the Government to claimant was duly found and certified to Congress for payment by appropriation. It was not, therefore, a mere bounty or gratuity, in respect of the payment of which no obligation whatever is imposed upon the Government. Congress, in respect of this claim, as well as of other claims embraced in the war claims act of March 4, 1915, was called upon to discharge a debt of the United States—a duty imposed by the Constitution, which, in express terms, forbids the taking of private property for public use without just compensation.

But does the provision of the war claims act under consideration abridge the liberty of contract granted the citizen by the Constitution? The word "contract" does not appear in the fifth amendment, but the word "liberty" therein used has a much broader meaning than the mere absence of physical duress. "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." Allgeyer v. Louisiana, 165 U. S., 578, 589. To the same effect are the decisions in Williams v. Fears, 179 U. S., 270, 274; United States v. Joint Traffic Association, 171 U. S., 505, 572; Addystone Pipe & Steel Co. v. United States, 175 U. S., 211.

The terms "liberty" and "property" as used in the Constitution are of similar import. It is difficult to define "liberty of action" without invading the domain of property rights. The right to contract is both a liberty and a property right. Freedom of action involves the right to make and enforce contracts and included in this right is the right to acquire and dispose of property. The claim of Mrs. Erskine before the passage of the war claims act was property of a character which she could have disposed of by will. With the approval of the bill appropriating for its payment the proceeds were property the payment of which could be enforced by mandamus. U. S. ex rel. Parish v. MacVeagh, 214 U. S., 124. Likewise was the contract of plaintiffs property. This is true whether the act be construed, as we have held, as prohibiting the receipt by plaintiffs, irrespective of the source from which it is paid, of the portion of the fee contracted for in excess of twenty per cent of the amount appropriated, or merely as depriving them of their lien on the particular fund, leaving unaffected their right to subject other property of defendant to the payment of such fee. The provision of the contract for a lien creates a valid right, and, as such, is entitled to the same protection as any other legal right created thereby. It may well be that in many of these war claims cases the claimants have no property other than the fund recovered, and to deprive counsel

of the right to enforce their contracts for compensation out of those funds would, in effect, render them valueless. The contract here had been executed so far as plaintiffs were concerned. As this court said in Roberts v. Consaul, supra, where a similar contract was involved: "The services of the attorney as contracted for were performed and the consideration therefor earned when the judgment was recovered. All that remained for him to do, if permitted, was to receive the draft for the appropriation made by Congress for the payment of the judgment." The Supreme Court went further in McGowan v. Parish, supra. McGowan had been employed under a contingent-fee contract to prosecute the claim of Parish. Before completion of the case Parish employed other counsel and attempted to dispense with McGowan's services. The court upheld the right of the executrix of McGowan to recover on the contract. Such a contract must be property, for an executor takes nothing by virtue of his appointment but property belonging to the testator. In Williams v. Heard, 140 U. S., 229, the court, speaking of the validity of a claim for a portion of the fund paid by Great Britain to the United States as the result of the settlement of the Alabama claims, said: "The claims in this case differ very materially from a claim for a disability pension, to which they are sought to be likened. They are descendible; are a part of the estate of the original claimants, which, in case of their death, would pass to their personal representatives and be distributable as assets; or might have been devised
26 by will; while a claim for a pension is personal and not susceptible of passing by will or by operation of law as personalty."

But it is insisted that the inhibition of the fourteenth amendment to the Constitution against the impairment of contracts is a limitation upon the legislatures of the States, and not upon Congress. Unquestionably, Congress may indirectly and incidentally impair the obligations of a contract. The power of Congress, however, to impair or modify contracts is confined to those instances where Congress has been vested with the power to control or regulate out of considerations of public policy the matters to which the contract relates. "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution." Buttfield v. Stranahan, 192 U. S., 470.

This brings us to the authorities relied upon by defendants in this case. The Sinking-Fund cases (Union Pac. R. Co. v. United States, 99 U. S., 700; Central Pac. R. Co. v. Gallatin, 99 U. S., 727) involved the power of Congress to require the railroad companies to

create a sinking fund for redemption of their bonds upon which the Government had loaned its credit and was liable. The majority opinion of the court upheld the enactment on the ground that Congress had retained the right to alter or amend the charter under which the companies acquired their rights from the Federal Government. The court, however, confined the right of Congress by legislation to interfere with private rights to cases involving governmental purposes. Defining this power, the court said: "The United States can not any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. * * * That this power has a limit, no one can doubt. All agree that it can not be used to take away property already acquired under the operation of the charter. * * * Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing it can not undo what has already been done, and it can not unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it can not now by direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All said legislation will be confined in its operation to the future." What Congress attempted in the present act is just what the court said in the Sinking-Fund cases could not be done—"release debts already contracted" or "avoid debts already incurred."

The Legal Tender cases (Knox v. Lee and Parker v. Davis, 12 Wall., 457) relied upon by counsel for defendants, involved the power of Congress to make United States Treasury notes a legal tender in payment of debts between individuals. The decision turned largely upon the power of Congress to coin money and regulate its value, borrow money and emit bills of credit. This being an express constitutional power delegated to Congress, the court will not attempt to define or limit Congress in the means employed to carry out the constitutional object. The court, however, held that the act did not impair contracts, since, when persons enter into contracts,

they are presumed to do so with full knowledge of the power of Congress to regulate coinage, and will be presumed to agree for payment in legal money at the date of payment. Speaking of the limitations upon Congress the court said: "We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. * * * It can not, therefore, be maintained that the legal-tender acts impaired the obligation of contracts."

That the legal-tender act was not regarded by the Supreme Court as impairing the obligations of contracts is clear from the ruling in Trebilcock v. Wilson, 12 Wall., 687. There the contract, made before the passage of the act, called for the payment of a certain amount "in specie," and the court held that payment could not be enforced in Treasury notes, as could be done where the contract called merely for the payment of a certain sum of money without specifying "specie." It was also held in the earlier case of Bronson v. Rodes, 7 Wall., 229, that where a contract called for payment "in gold and silver coin, lawful money of the United States," it must be paid in coin.

Counsel for defendants also rely upon the case of Atlantic Coast Line v. Riverside Mills, 219 U. S., 186, involving the constitutionality of the Carmack amendment to the interstate commerce act (34 Stats. L., 584, 595), whereby the initial carrier was made liable for loss or damage of goods shipped over its line and the lines of connecting carriers. The decision turned upon the constitutional power expressly conferred upon Congress to regulate interstate commerce. But this act was prospective and prohibited only fu-
27 ture contracts, and the contract under consideration having been made after the enactment of the law came clearly within its provisions. Stress was laid upon the expression of the court to the effect "that there is no such thing as absolute freedom of contract." But the context discloses that the statement was addressed to "contracts which contravene public policy" or which "injuriously affect public interests." Had the contract there involved been made prior to the passage of the Carmack amendment, it is safe to assume from the language of the opinion that the conclusion reached by the court would have been different.

This brings us to the specific cases wherein Congress has limited counsel fees. The limitation as to pension cases is found in the act of Congress of June 20, 1878 (20 Stats. L., 243), which provides: "It shall be unlawful for any attorney, agent, or other person to demand or receive for his services in a pension case a greater sum than ten dollars. No fee contract shall hereafter be filed with the Commissioner of Pensions in any case. In pending cases in which a fee contract has heretofore been filed, if the pension shall be allowed, the Commissioner of Pensions shall approve the same as to the amount of the fee to be paid at the amount specified in the contract."

Interpreting this act the court, in Frisbie v. United States, 15
U. S., 160, said: "The pension granted by the Government is
matter of bounty. 'No pensioner has a vested legal right to his pe
sion. Pensions are the bounties of the Government, which Congre
has the right to give, withhold, distribute, or recall, at its discretio
Walton v. Cotton, 60 U. S., 355; United States v. Teller, 107 U. S
64, 68. Congress being at liberty to give or withhold a pensio
may prescribe who shall receive it, and determine all the circu
stances and conditions under which any application therefor shall b
prosecuted. No man has a legal right to a pension, and no man h
a legal right to interfere in the matter of obtaining pensions fo
himself or others. The whole control of that matter is within th
domain of congressional power. United States v. Hall, 98 U. S
343. Having the power to legislate on this whole matter, to pr
scribe the conditions under which the parties may assist in procurin
pensions, it has the equal power to enforce by penal provisions com
pliance with its requirements."

In two important particulars are pension cases distinguishabl
from the one at bar. A pension is a gratuity, while the claim here i
a valid debt of the Government. The pension act limiting counse
fees is prospective, and all contracts filed at the date of the act wit
the Commissioner of Pensions in accordance with section 4786, R. S.
were preserved, with direction to the commissioner to give the
effect according to their terms, while here existing contracts ar
stricken down, and an attempt to carry them into effect is made a
misdemeanor. The court in the Frisbie case distinguishes a pensio
claim as not constituting a legal claim or demand against the Gov
ernment. "No man has a legal right to a pension, and no man has
legal right to interfere in the matter of obtaining pensions for him
self or others," implying clearly that in a claim for private property
taken for public use a claimant would have a legal claim and the
untrammeled right to contract with a lawyer to represent him in
securing its recovery.

To the same effect is the act of December 22, 1911 (37 Stats. L.
47, 49), relating to claims of soldiers for back pay and bounty, which
provided that no attorney should demand or receive any fee in con
nection with any claim "filed after the passage of this act." These
like pensions, are not legal obligations of the Government, but mer
gratuities, and Congress again limits the exercise of its power to th
future, reserving the integrity of existing contracts.

The last class of cases in which limitations of this sort are foun
is Indian depredation claims (26 Stats. L., 851). These claims ar
not legal demands against the United States. The Government pr
vided a tribunal in which persons who had lost property at the hand
of any of the Indian tribes at a time when the Indians were in amit
with the United States might present their claims and have the
adjudicated. True, the judgments are against the United States, b
they are chargeable against the funds of the Indians in the Treasu

But, as in the other bounty or gratuity cases cited, the limitation applied to the future, in that it was part of the act authorizing claimants to present their claims in the Court of Claims for adjudication. It was part of the act permitting the Government to be sued in this class of cases. What effect such a limitation would have had if it had been embraced in the Tucker Act to apply to all cases prosecuted thereunder it is unnecessary to decide, since no such provision exists. But that situation is essential before any analogy can be drawn between the present act and the Indian depredation act.

This brings us to the case of Ball v. Halsell, 161 U. S., 72, strongly relied upon by defendants. Ball sued Halsell on the following contract:

"We, the undersigned parties of the first part, do hereby constitute and appoint Thomas Ball, our lawful attorney, to receive, and to make, sign, and give all necessary acquittances and receipts for, one-half of all money which may be received by him as our attorney at law, for prosecuting claims against the United States Government, on account of the depredations of the Commanche and Kiowa Indians on our property of horses, mules, and cattle in the State of Texas. Said one-half being the amount agreed by us to pay him of all that he may recover of said Government for said depredations.

"Given under our hands this 22d day of May, A. D. 1874.

"J. G. HALSELL."

Ball presented in 1875 a claim of Halsell's to the Department of the Interior and prosecuted it before the department, securing a recommendation for the payment of $19,625 to Halsell for the depredations alleged in the contract. No appropriation was ever made to pay the sum awarded. After the passage of the Indian depredation act, Ball brought suit in the Court of Claims and secured judgment for Halsell in the amount of $17,720, the court awarding Ball an attorney's fee of $1,500. Hence, Ball sued to recover the balance of one-half of the amount for which judgment was awarded.

The Indian depredations act must be construed either as
28 taking away the former remedy before the Interior Department or as granting an additional remedy, either of which Congress had power to do. If it took away the former remedy, then Ball's contract fell; if it only created an additional remedy, Ball had the option of pursuing the old remedy, upon which there was no limitation as to the amount of fees that might be charged, or he had the option of accepting the new remedy subject to all the terms which it imposed. He did the latter, and the court held that he was subject to the limitations of the act.

But the discussion, so far, is on the assumption that Ball had, but for the provisions of the act, a valid, enforceable contract. But his contract could not have been enforced if no limitation as to attorney's fees had been placed in the depredation act. The contract amounted to an assignment of one-half of the claim, which is especially forbidden by statute. Disposing of the case the court

said: "But in the present case, as has been seen, the original agreement was contrary to the express terms of the act of Congress of 1853. That agreement can not, as it appears to us, be construed as a promise of the principal to pay to the attorney any sum whatever, except out of money recovered and received by the attorney from the United States. The act of Congress of 1891 expressly declared void 'all contracts heretofore made for fees and allowances to claimants' attorneys.' This act was passed before the attorney had either recovered or received any money from the prinpal's claim against the United States. The act did not recognize either the lawfulness or the amount of the claim, or make any appropriation for its payment. But it provided for its ascertainment and adjudication by judicial proceedings, and for the allowance, by the judgment in those proceedings, of a reasonable compensation to the attorney. The restriction of the compensation of attorneys to the amounts so allowed by the court was one of the terms and conditions upon which the United States consented to be sued."

Thus, it will be observed that Ball had an invalid contract upon which he could not have recovered if there had been no limitation in the Indian depredation act. The claim he recovered was not a legal demand against the Government. Hence, Congress could place any limitation upon the right of recovery it saw fit. In other words, Halsell's claim was not property until the appropriation was made for its payment, while Mrs. Erskine's claim was property from the date her property was taken by the military forces of the United States. The one was a gratuity, concerning the payment of which no legal duty was imposed upon Congress; the other was a debt of the Government which Congress could not legally refuse to pay. Plaintiff's contract was a chose in action, and, therefore, property from its date. The act here in question was passed after the fee had been earned and when Congress was preparing to pay the judgment. In this respect it is distinguishable from the Ball case, wherein the court said: "This act was passed before the attorney had either recovered or received any money upon the principal's claim against the United States. The act did not recognize either the lawfulness of the amount of the claim or make any appropriation for its payment."

The act in question is retroactive, in that, instead of forbidding future contracts, it reaches back and strikes down existing legal contracts between private individuals, contracts which at the date of the act had been fully executed by the attorneys. It also discriminates against attorneys who happen to represent claimants whose claims were embraced within this particular war claims act. Reference to the statutes discloses that war claims acts have been passed in several instances since the enactment of the Tucker act, as well as acts for the payment of individual claims, yet in no other instance has any attempt been made to limit the amount of attorney's fees which might be charged. "A statute would not

e constitutional * * * which should select particular individuals from a class or locality, and subject them to peculiar rules or impose upon them special obligations or burdens from which others in the same locality or class were exempt. * * * Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied to all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments." Cooley on Constitutional Limitations, 6th ed., 481, 483, quoted with approval in Mathews v. People, 202 Ill., 389. Concretely speaking, what was done lawfully by counsel in war claims cases from the enactment of the Tucker act, became a misdemeanor if done by counsel representing claims in the present act.

But more serious than all other defects, the act under consideration is an attempt by Congress to deprive plaintiffs of their property without due process of law. An act of Congress does not constitute due process of law, unless it be to lay and collect taxes, duties, imposts, and excises. The powers of Congress are purely legislative. They are neither administrative nor judicial. This constitutional limitation is a restriction upon both legislative and executive power. Due process of law means the regular course of administration through the courts. The refusal of Congress, in the exercise of vested power, to pay a just debt of the Government, or to pay a less amount than is due, is not due process of law. In such a case Congress is without lawful discretion, and any action short of full justice is the exercise of arbitrary power. The Government has no more right to repudiate a just debt than has the citizen. It logically follows that any attempt on the part of Congress in the payment of a just debt of the Government, ascertained by a regularly appointed judicial tribunal, to limit the creditor in the full enjoyment of the money appropriated, or to exempt the fund in the hands of the creditor from just claims to the payment of which it might be otherwise lawfully subjected, would not be due process of law, but the mere exercise of arbitrary power, unwarranted either in law or principle. Such, we think, was the action in this case. The rights of plaintiffs under their contract had become vested, and nothing is clearer than that Congress is without power by direct legislation to destroy or modify the obligations of a contract between private individuals, except it be by a uniform bankruptcy law, which power Congress expressly derives from the Constitution. Congress may, in the exercise of vested power, indirectly affect existing contracts, but it has no power, by direct enactment, otherwise than by a bankruptcy law, to change the terms of a private contract whereby either party thereto is released in whole or in part from his obligations.

When Congress attempted to reduce the fee called for by plaintiffs' contract, it amounted to taking their property, due them under a private valid contract, and handing it over to another. If this is not deprivation of liberty and property without due process of law it would be difficult to conceive of a case where the inhibition of the Constitution would apply. If this were held to be a valid exercise of vested power by Congress the liberty and property rights of the citizen would be subject to the legislative will. It is difficult to conceive of a more dangerous or tyrannical system of government than that which would logically spring into existence if the legislative fiat were held to be supreme. "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people." Wilkinson v. Leland, 2 Pet., 627, 657.

It follows that the act in question is in conflict with the limitations of the Constitution in the particulars above mentioned, and, therefore, void.

The decree is affirmed with costs.

Mr. Chief Justice SMYTH dissenting:

I regret that I am not able to concur in the judgment of the court, first, because of my very high regard for the opinion of my associates formed in the light of their wide juridical experiences and, second, because I think the appellees have earned the money which they claim; but I can not, of course, permit these considerations to affect the performance of my duty as I see it.

We are asked to declare section 4 of the act of Congress of March 4, 1915, invalid for want of constitutional power to pass it. The question of congressional authority then is the question at issue. No other question is presented by Secretary McAdoo and Treasurer Burke, and they are the only appellants who appear in this court. Before we proceed to the solution of the problem thus raised we must ascertain the meaning of the attacked section, and in doing this it is our duty if it has more than one signification, to give to it such interpretation, if possible, as will sustain its constitutionality. The Supreme Court of the United States has said: "If the section admits of two interpretations, one of which brings it within, and the other presses it beyond, the constitutional authority of Congress, it would become our duty to adopt the former construction, because a presumption never ought to be indulged that Congress meant to exercise or usurp any constitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous." United Stat

v. Coombs, 12 Peters, 71–75. If possible, a construction should be given to the act "that will render it free from constitutional objection." Marshall v. Grimes, 41 Miss., 27–31, approved in Grenada County Supervisors v. Boyden, 112 U. S., 261–266. "The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality." Hooper v. California, 155 U. S., 648–657. "We can not attribute to the legislature unless compelled to do so by its plain words the purpose to pass an act in conflict with an act of Congress on a subject over which Congress is given authority by the Constitution of the United States." Presser v. Illinois, 116 U. S., 252–269.

Guided by this rule, and reading section 4 in connection with its cognate section, let us see what the section means. Section 1 of the same act provides that the Secretary of the Treasury is "authorized and directed to pay out of any money in the Treasury not otherwise appropriated to claimants in this act named the several sums appropriated herein." Section 4 says that "no part of the amount of any item appropriated in this act in excess of 20 per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim." "Shall he paid" by whom? Manifestly, by the Secretary of the Treasury. He is first directed to pay the money to the claimant named in the act and then commanded not to pay any part of the appropriation in excess of 20 per centum thereof to "any agent or agents, attorney or attorneys on account of any services rendered or advances made in connection with said claim." No money can be paid out of the Treasury of the United States except in accordance with an act of Congress and when Congress says to the Secretary of the Treasury that he shall pay a given sum to a named person and forbids him to pay it to anybody else, it would seem that it was acting within its constitutional power and that the Secretary of the Treasury was bound to obey. None the less the lower court, by its judgment, which a majority of this court affirms, directed the Secretary of the Treasury to pay this money, not to the claimant but to another person, and then required that person to pay a part of it to the appellees, thus in effect commanding the Secretary of the Treasury to ignore an explicit act of Congress. It is my judgment that in doing so, the court exceeded its authority.

But it may be urged that this is too narrow a basis upon which to place a judgment. I do not think so. But assume for the moment that it is and that the act should be considered from another angle, namely, that it prohibits the claimant from paying anything in excess of the 20 per centum to the attorneys; that they are forbidden to receive more than 20 per centum, and that any contract purporting to authorize them to receive more is by virtue of the act invalid. So considering it, does the act render the contract unenforceable for all purposes, or merely as to the *the* appropriation made by the act? Here we need again to invoke the rule of interpretation mentioned above. We think that a correct construction of the act, certainly a

permissible one, would be that the prohibition relates to the appropriation only. Congress was dealing with the appropriation and nothing else. The first sentence of section 4 prohibits any payment out of the appropriation except as therein provided. The second sentence declares it unlawful for any person to withhold or receive any sum out of the appropriation over and above 20 per centum, and makes invalid any contract to the contrary. Clearly, then, in my judgment, the prohibition relates to the appropriation and to nothing else. So far as it is concerned, the contract has no effect, but as to any other resources which the client may have, there is nothing in the act which prohibits the enforcement of the contract. Nutt v. Knut, 200 U. S., 12–20; Wright v. Tebbitts, 91 U. S., 252–253.

This brings us to the inquiry as to whether or not Congress possessed the power to say upon what conditions it would pay the claim for which the appropriation was made. To answer we are not required or permitted to consider the wisdom or the justice of the claim itself or of the condition attached. The power of Congress does not depend upon such things. If it had the power to attach the condition, it was the sole judge of the wisdom or justice of the condition. Congress had the power to pay a part of this claim or to refuse to pay any of it. This can not be successfully denied. And having that power, it must also have had the other power to say upon what conditions it would pay. The whole includes the part.

Statutory provisions similar to the one under review have been sustained by the courts. In Davis v. Commonwealth, 164 Mass., 241-243, a case in which Mr. Justice Holmes, now of the Supreme Court of the United States, participated, the court was called upon to consider such a provision. Congress had passed an act to reimburse to the States and Territories certain taxes collected under a former statute of the United States and provided that no part of the money appropriated "shall be paid out * * * to any attorney or agent under any contract for services now existing or heretofore made between the representative of any State or Territory and any attorney or agent." The State of Massachusetts employed the plaintiff to present its claim and agreed to pay him for his services 2 per cent of the amount which he should collect. He sued to recover the contract fee, and thus was raised the effect of the prohibitory clause just set out. The court, speaking to this point, said: "It may be that Congress, in appropriating money to be paid by the Treasurer of the United States to the States, can impose upon it any trust that it sees fit, and the State that receives the money is bound to carry these trusts into effect." It was further said that since the clause of the plaintiffs' contract providing for compensation was "a subordinate and separate part" thereof, it might be "waived or modified without a cancellation or avoidance of the whole contract." The effect of the decision, as I read it, is that while plaintiff, by reason of the congressional prohibition, could not recover anything from the fund created by the act of Congress, his contract was not void in toto, but could be enforced against any other fund that might be availab[illegible]

Ball v. Halsell, 161 U. S., 72, is a poineer case upon the subject. The plaintiff was employed in 1874 to prosecute a claim against the United States on account of Indian depredations and was by his contract authorized "to receive, make, and sign, and give all necessary acquittances and receipts for one-half of all money" collected, it being stated that the one-half thus provided for was "the amount agreed" upon as his fee for services rendered in prosecuting the claim. He presented the claim to the Department of the Interior, and in 1875 secured from it a recommendation for the payment of a certain sum. No appropriation was made by Congress to pay the sum so awarded. On March 6, 1891, after the passage by Congress of an act (chapter 538, 26 Stat., 851) which authorized the adjudication of such claims by the Court of Claims, the plaintiff, acting under his contract, brought suit in that court to recover the sum awarded by the Department of the Interior and secured a judgment for $17,720, which provided that out of this sum $1,500 should be paid to him. He claimed one-half of the $17,720 and sued to recover it. The act of Congress last mentioned declared that "all contracts heretofore made for fees and allowances to claimant's attorneys are hereby declared void." It will be noticed that this act was passed long after the plaintiff had made his contracts and long after he had secured from the Department of the Interior a recommendation for the payment of the claim. Plaintiff asserted that the provision in question was void because, among other things, it impaired the obligation of a lawful contract and deprived the plaintiff of his property without due process. The court in considering this objection reviewed many decisions on related subjects and then said the "provision was a wise, reasonable, and just provision for the protection of suitors, and it was clearly within the constitutional power of Congress." In the case at bar the contract does not provide in terms that the attorney is to be paid out of money recovered from the United States, but the theory of the appellees is that it does so in effect, and for that reason they ask for the release sought in this suit. Ball's contract was in existence, and he had performed valuable services under it at the time the congressional act limiting fees was passed. None the less, the court held that he could not recover the contract fee out of the fund appropriated. This case can not be distinguished from the one before us on the ground that the plaintiff had elected to prosecute his client's case in the Court of Claims rather than by pursuing some other method, because the record does not show that he had any other effective means of enforcing it and the doctrine of election does not apply except where such means exist. Omaha v. Redick, 61 Neb., 163.

Chief Justice Taney in Beers v. Arkansas, 20 How., 527–529, said that it was "an established principle of jurisprudence * * * that the sovereign can not be sued in its own courts without its permission * * * and that as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions upon which it consents to be sued and the manner in which the suit shall be conducted." In re Ayers, 123 U. S.,

443–505; Hans v. Louisiana, 134 U. S., 1–17. The right to be heard in a court of justice is in quality closely related to the right to have paid a just debt, and if the sovereignty, speaking through Congress, "may prescribe the terms and conditions upon which it consents to be sued," may it not by a parity of reasoning prescribe to the terms and conditions on which it will pay a debt?

The plaintiff, in Spaulding v. Vilas, 161 U. S., 483–490, alleged that he was employed in 1871 by a number of postmasters to obtain a review and readjustment of their salaries and that they authorized him to prosecute any claim which they might have against the Government and "to receive the drafts which might be issued in payment therefor." Several acts of Congress were passed making appropriations for the payments of the claims. The one construed by the court was approved August 4, 1886, and provided that payment of all sums thereby appropriated "shall be payable by warrant * * * and payable to the order of and transmitted to the persons respectively entitled thereto." The court said of this provision: "Whatever may have been the value of any services rendered by the plaintiff for his clients, even if the readjustment of their salaries was wholly due to his efforts 'to procure mandatory legislation by Congress pressing such legislation by all lawful means in his power,' through many years, it was competent for the legislative branch of the Government to provide that any sums ascertained to be due to claimants should be paid directly to them. * * * No one will question the power of Congress to enact legislation that would effect such an object. Ball vs. Halsell, ante, 72. If such legislation worked injury to the plaintiff in that it gave his clients an opportunity to evade, for a time, the payment of what they may have agreed to allow him, it was an injury from which no cause of action could arise. This view is so clear that no argument in its support is necessary." If it was competent for the legislative branch of the Government to provide in that case that any sum ascertained to be due to the claimants should be paid directly to them, and that no one will question the power of Congress to enact legislation to that effect, what becomes of the argument here that Congress did not have the power to direct that the money appropriated should be paid directly to the claimants, except 20 per cent thereof. And may I not say here as was said there that if such legislation worked injury to the plaintiffs in that it gave their clients an opportunity to evade, for a time, the payment of what she has agreed to allow them, it was an injury from which no cause of action could arise.

The Supreme Court of Arkansas, in Ralston et al. v. Dunaway et al., 184 S. W., 425, sustained the constitutionality of section 4, saying: "It is manifest from the contract that the parties realized that the claim could only be paid by an appropriation voluntarily made by the Government and necessarily contracted with reference to such appropriation and the terms thereof."

It is no longer debatable that Congress in the exercise of a conceded power may declare invalid contracts lawful at the time they were made, which in any way impair the free exercise of that power. In illustration of this reference may be had to the Sherman Anti-Trust Statute of 1890 in which contracts in restraint of trade are declared to be illegal; Federal Employers' Liability Act of 1908 making unenforceable contracts providing that acceptance by employees of benefits from relief departments of railroads should not release the railroad company from liability for injuries inflicted, and the statute of 1906 invalidating contracts providing for compensation different in kind from that mentioned in the public tariff schedules of railroad rates. United States v. Standard Oil Co., 221 U. S., 1; Louisville & Nashville Railroad Co. v. Mottley, 219 U. S., 467; Philadelphia, Baltimore & Washington Railroad Co. v. Shubert, 224 U. S., 603. In the Mottley case Mr. Justice Harlan, speaking for the court, said: "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such state of things to exist." Mr. Justice Hughes spoke to the same effect in the Shubert case. Congress has the power to pay the debts of the United States, to adjust claims against it, and appropriate money out of the Treasury for such purposes as it may think will serve the general welfare. If in the exercise of this power it finds its way impeded by a contract of individuals such as the one at bar, it may brush it aside as ineffectual; otherwise the constitutional authority of Congress could be limited by the act of individuals. Is it possible to paraphrase the language of Mr. Justice Miller, speaking for the Supreme Court of the United States, that by making a contract with their client the appellees could prevent the Government from settling with the client on any terms it thought proper? Kendall v. United States, 7 Wall., 113–117. The contracts of the appellees with their client in the case at bar were made subject to this congressional authority and must be read as if they provided in terms that they were conditioned upon the power of Congress to make, in the act appropriating money for the claim, such provisions with respect to attorneys' fees as it might think suitable.

Much is said about the justness of the claim presented by appellees' client. Its justice may be conceded, and I add: Congress has made provision for the payment of every penny of the claim. But as I have observed at the outset, the justice of the claim has no tendency to advance the argument on behalf of the appellees. Congressional authority is not measured by the quality of justice which an act embraces, nor have the courts any warrant to inquire into the

right or wrong of such an act and declare it valid or void as they may regard its ethical character. In this connection, however, it may be observed that the claims in the Massachusetts and Spaulding cases, supra, were also just, but that did not make void the prohibitory condition attached by Congress to the act providing for their payment. Back pay for soldiers of the War of the Rebellion was provided for by the act of 1911 (37 Stat. L., 47), and there was also a provision limiting the amount which might be paid to attorneys. A claim for back pay due for service on the battle field should be as sacred as a claim for property taken. Even if we inquire into the merits of the attorneys' claims for fees in each of the aforementioned cases, it will be discovered that they were as sound as those of the one before us.

32 Acts of Congress making appropriation for claims are cited in which the integrity of existing contracts is preserved. If these are referred to for the purpose of showing Congress's estimate of its own power in the circumstances, it seems to me they militate against, rather than aid, appellees, for if Congress did not believe that it had the authority to affect preexisting contracts, why a clause saving them from its acts? The act of 1853 (10 Stat. L., 170), the act of 1878 (20 Stat. L., 243), and the act of 1911 (37 Stat. L., 37) contained conditions like section 4. The former, albeit repeatedly before the Supreme Court of the United States, has always been sustained, and no like provision, there being many of them, has ever been held void by that tribunal.

Believing section 4 of the act under examination to be clearly within the purview of congressional power, I think the judgment of the lower court should be reversed with costs and cause remanded with directions to dismiss the bill.

33 MONDAY, *December 3rd, A. D. 1917.*

SUE ERSKINE NEWMAN, ADMINISTRATRIX OF THE estate of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,

vs.

IDA M. MOYERS AND CHARLES F. CONSAUL, partners, trading as Moyers and Consaul.

No. 3021. October term, 1917.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL,
December 3, 1917.

Mr. Chief Justice SMYTH dissenting.

34 In the Court of Appeals of the District of Columbia.

January term, 1918.

SUE ERSKINE NEWMAN, ADMINISTRATRIX OF THE ESTATE OF Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants, vs. IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS, TRADING as Moyers and Consaul, appellees.	No. 3021.

Petition for appeal.

Now come the said Sue Erskine Newman, administratrix of the estate of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, and say that in the rendition of the judgment of the court here, affirming the judgment of the Supreme Court of the District of Columbia herein, error has intervened to their prejudice, as well as in the rendition of the said judgment in the Supreme Court of the District of Columbia.

Wherefore they pray an appeal in this behalf to the Supreme Court of the United States for the correction of the errors aforesaid, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States in accordance with law.

35 The petitioners show to your honors:

1. That in this case the constitutionality of a law of the United States is drawn in question.

2. The scope of a power of officers of the United States is drawn in question.

3. The jurisdiction of the Supreme Court of the District of Columbia is drawn in question.

SUE ERSKINE NEWMAN,
Administratrix of the estate of Ursula Ragland Erkine, deceased,

(Signed) By JNO. LEWIS SMITH, *Attorney.*

WILLIAM G. MCADOO,
Secretary of the Treasury,

JOHN BURKE,
Treasurer of the United States,

By JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia, Attorney.

(Endorsed:) No. 3021. Sue Erskine Newman, &c., et al., appellants, vs. Ida M. Moyers, et al. Petition for appeal. Court of Appeals, District of Columbia. Filed Feb. 26, 1918. Henry W. Hodges, clerk.

36 In the Court of Appeals of the District of Columbia.

January Term, 1918.

SUE ERSKINE NEWMAN, ADMINISTRATRIX OF THE ESTATE of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants, *vs.* IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS, trading as Moyers and Consaul, appellees.	No. 3021.

Assignment of errors.

Now come the said Sue Erskine Newman, administratrix of the estate of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, and make the following assignment of errors in the above entitled cause:

The Court of Appeals erred:

1. In affirming the judgment of the court below.

2. In deciding that the provisions of section 4 of the act of Congress (Public, No. 289, 63d Congress) are unconstitutional.

3. In refusing to decide that the provisions of section 4 of the act of Congress (Public, No. 289, 63d Congress) are constitutional.

37 4. In deciding that the court had jurisdiction to restrain the action of the said William G. McAdoo and John Burke, as Secretary of the Treasury and Treasurer of the United States, respectively, in disbursing the fund.

5. In refusing to decide that the court was without jurisdiction to restrain the action of the said William G. McAdoo and John Burke, as Secretary of the Treasury and Treasurer of the United States, respectively, in disbursing the fund.

6. In deciding that the suit is not one against the United States.

7. In deciding that the situs of the fund was within the jurisdiction of the court.

8. In refusing to decide that the situs of the fund was not within the jurisdiction of the court.

(Signed) JNO. LEWIS SMITH,
Attorney for Sue Erskine Newman, administratrix of the estate of Ursula Ragland Erskine, deceased.

(Signed) JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia.
Attorney for William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States.

(Endorsed:) No. 3021. Sue Erskine Newman, &c., et al., appellants, vs. Ida M. Moyers et al. Assignment of errors. Court of Appeals, District of Columbia. Filed Feb. 26, 1918. Henry W. Hodges, clerk.

TUESDAY, *February 26th, A. D. 1918.*

SUE ERSKINE NEWMAN, ADMINISTRATRIX OF THE ESTATE of Ursula Ragland Erskine, deceased; *William G.* McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,
vs.
IDA M. MOYERS AND CHARLES F. CONSAUL, PARTNERS, trading as Moyers and Consaul

No. 3021.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, it is by the court this day ordered that said appeal be and the same is hereby allowed.

39 UNITED STATES OF AMERICA, *ss:*

To Ida M. Moyers and Charles F. Consaul, partners, trading as Moyers and Consaul, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Sue Erskine Newman, administratrix of the estate of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 26th day of February, in the year of our Lord one thousand nine hundred and eighteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged February 27, 1918.
CHAS. F. CONSAUL,
Counsel for appellees.

40 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 39, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Sue Erskine Newman, administratrix

of the estate of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants, vs. Ida M. Moyers and Charles F. Consaul, partners, trading as Moyers and Consaul, No. 3021, January term, 1918, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of February, A. D. 1918.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Endorsed on cover:) File No. 26444. District of Columbia, Court of Appeals. Term No. 85. Sue Erskine Newman, administratrix of the estate of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants, vs. Ida M. Moyers and Charles F. Consaul, partners, trading as Moyers and Consaul. Filed April 16th, 1918. File No. 26444.

MAR 11 1920
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

October Term, 1919.

No. 85.

Sue Erskine Newman, Administratrix of the Estate of Ursula Ragland Erskine, Deceased; Carter Glass, Secretary of the Treasury; and John Burke, Treasurer of the United States,
Appellants,
vs.
Ida M. Moyers and Charles F. Consaul, Partners Trading as Moyers and Consaul,
Appellees.

MOTION TO DISMISS APPEAL of SUE ERSKINE NEWMAN, ADMINISTRATRIX OF ESTATE OF URSULA RAGLAND ERSKINE, DECEASED, WITH BRIEF.

IDA M. MOYERS,
CHAS. F. CONSAUL,
Attorneys for Appellees.

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

October Term, 1919.

No. 85.

Sue Erskine Newman, Administratrix of the Estate of Ursula Ragland Erskine, Deceased; Carter Glass, Secretary of the Treasury; and John Burke, Treasurer of the United States,
Appellants,
vs.
Ida M. Moyers and Charles F. Consaul, Partners Trading as Moyers and Consaul,
Appellees.

MOTION TO DISMISS APPEAL of SUE ERSKINE NEWMAN, ADMINISTRATRIX OF ESTATE OF URSULA RAGLAND ERSKINE, DECEASED.

Come now Ida M. Moyers and Charles F. Consaul, partners trading as Moyers and Consaul, appellees, and respectfully move that the appeal in the above-

entitled cause, of Sue Erskine Newman, Administratrix of Estate of Ursula Ragland Erskine, Deceased, be dismissed, and as grounds for this motion respectfully represent:

1. That said appellant has entered no appearance in this Court.

2. That said appellant has caused no brief to be filed in this Court.

3. That said appellant did not appear or present brief or argument in the Court of Appeals, of the District of Columbia. See opinion, record, page 34, reading as follows:

> The question of congressional authority then is the question at issue. No other question is presented by Secretary McAdoo and Treasurer Burke, *and they are the only appellants who appear in this Court.*

Respectfully submitted,
IDA M. MOYERS,
CHAS. F. CONSAUL,
Attorneys for Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

From the decreee entered herein an appeal was prayed by all parties defendant. Two of the appellants, to wit, Carter Glass (substituted for William G. McAdoo), Secretary of the Treasury, and John Burke, Treasurer of the United States, have appeared in this Court, and have filed a brief.

In view of this fact, appellees further show to the Court:

(A). The decree from which appeal was taken consisted of several distinct parts, against different par-

ties defendant, in wholly different capacities, said parties defendant having no common interest, save such as may exist between Hon. Carter Glass, Secretary of the Treasury, and Hon. John Burke, Treasurer of the United States. (Record, p. 18.)

(B). By numbered paragraph 1 of said decree it was adjudged, ordered and decreed, that William G. McAdoo, as Secretary of the Treasury, and John Burke, as Treasurer of the United States, do pay into the registry of the Court the sum of $1,836.66, and that upon making such payment they be fully discharged and go hence without day.

(C). By numbered paragraph 2 of said decree it was adjudged, ordered and decreed:

> "That the plaintiffs, Ida M. Moyers and Charles F. Consaul, partners, trading as the firm of Moyers and Consaul, do have and recover from the defendant, Sue Erskine Newman as administratrix of the estate of Ursula Ragland Erskine, deceased, the sum of nine hundred and eighteen and 33/100 dollars ($918.33) and the costs of this cause, to be taxed by the Clerk, * * * ."

(D). As to that paragraph decreeing that plaintiffs (appellees) do have and recover from the defendant, Sue Erskine Newman, administratrix, the sum of nine hundred eighteen and 33/100 dollars ($918.33), the appellants who have appeared in this Court, have absolutely no interest or concern. It is obviously wholly immaterial to appellants Glass and Burke, whether plaintiffs secure a decree against Mrs. Newman, administratrix, for $918.33, or for $9.18, or for any other sum, either in this suit or in any other suit; and it is equally immaterial to Glass and Burke, out of what

fund such a decree may be made, after the fund appropriated shall have been paid over by the Government.

Hence, the provisions of the decree being severable, one requiring Glass and Burke to pay certain money now in their custody into the registry of the Court; the other decreeing that plaintiffs do have and recover a certain sum of money against the other party defendant; there exists no reason why the appeal of said Sue Erskine Newman, administratrix, should not be dismissed, such action being without prejudice to the right of those appellants who have here appeared to present their appeal, if they have any interest to protect by appeal.

As to the propriety of dismissing an appeal as to certain of the appellants, where the interests of appellants were separate and distinct, see McMurray v. Moran, 134 U. S. 150.

In case of Stewart v. Masterson, 131 U. S. 151, Stewart filed a bill against Masterson and Tait. An order was entered that the bill be taken as confessed as against Tait. Thereafter a demurrer by Masterson was sustained, and the bill ordered dismissed as to him. Stewart thereupon appealed from the decree of dismissal, and this Court reversed that decree and remanded the case. In so doing, this Court expressly stated, however, that the decree had become *final as against Tait,* however, thereby closing the case as against him.

By analogy, in the case at bar, the decree below, so far as it was against Mrs. Newman, administratrix, *has also become final,* because she did not appear before the Court of Appeals and has not appeared before this Court.

As to failure of Mrs. Newman, administratrix of es-

tate of Mrs. Erskine, deceased, to appear before the District of Columbia Court of Appeals, we refer to that portion of the opinion of Chief Justice Smythe, of that Court (Rec. p. 34) reading as follows:

> The question of congressional authority then is the question at issue. No other question is presented by Secretary *McAdoo* and Treasurer *Burke, and they are the only appellants who appear in this Court.*

In this connection, attention is also asked to the allegation of plaintiffs' amended bill (Rec. 12), reading as follows, (emphasis supplied):

> 7. That said defendant, Sue Erskine Newman, administratrix of the estate of Ursula Ragland Erskine, deceased, after personal examination of said contracts above mentioned, admits them to be genuine, but asserts that she is advised that, in view of the terms of said section 4 of said act of Congress above set forth, she is prohibited by law from fulfilling the terms of said contracts so made by her decedent with plaintiffs herein, *although she is willing so to do.*

Plaintiffs offer the suggestion that the fact pleaded in the bill, as to willingness of Mrs. Newman to fulfill the terms of the contract made by her mother, if permitted by law so to do, doubtless accounts for her failure to present her appeal in the Court of Appeals, and for her failure to appear in this Court. Mrs. Newman, as a woman of honor, doubtless awaits the final action in this case in order to ascertain whether the law will permit her to fully carry out the contractual obligations of her deceased mother.

The mere fact that an appeal is here presented by other appellants, having no interest in common with Mrs. Newman, cannot operate to change the legal effect of her acts or of her failure to act, and the decree below is none the less final as against Mrs. Newman.

Assuredly, failure to perfect an appeal by appearing in the appellate court and presenting the alleged grounds of appeal, leaves the appellant in precisely the same position as one who has not prayed an appeal at all.

It has been impossible to give the usual notice of the filing of this motion to dismiss the appeal, and of intent to submit the motion, for the obvious reason that, until the case shall have been reached for argument, it will be impossible to predict whether or not a brief will be filed in support of the appeal of Mrs. Newman. Hence this motion has been prepared in advance, to be filed when the case is called for argument, if the record then warrants.

Respectfully submitted,

IDA M. MOYERS,
CHAS. F. CONSAUL,
Attorneys for Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SUE ERSKINE NEWMAN, ADMINISTRATRIX of the estate of Ursula Ragland Erskine, deceased; Carter Glass, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,

v.

IDA M. MOYERS AND CHARLES F. CONSAUL, partners, trading as Moyers & Consaul.

No. 85.

ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO SUBSTITUTE AS ONE OF THE APPELLANTS DAVID F. HOUSTON, PRESENT SECRETARY OF THE TREASURY, IN THE PLACE OF CARTER GLASS, FORMER SECRETARY THEREOF.

Comes now the Solicitor General, and suggesting to the court the resignation of Carter Glass as Secretary of the Treasury and the appointment of David F. Houston as his successor, respectfully moves the court that said David F. Houston be made a party appellant in the case in the place and stead of said Carter Glass as of February 2, 1920.

This is a suit by appellees, counsel for one Ursula Ragland Erskine (intestate of appellant Newman) in

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litigation in the Court of Claims, seeking, among other things, to establish an equitable lien for attorneys' fees upon the one-third interest of said administratrix Newman in a fund of $5,510 appropriated by Congress in satisfaction of a judgment of the Court of Claims in favor of said Ursula Ragland Erskine and her co-claimants. The appeal is prosecuted from a decision of the Court of Appeals of the District of Columbia affirming a decree ordering the payment by the Secretary of the Treasury and the Treasurer of the United States into the registry of the court of said one-third interest of appellant Newman as administratrix in the fund appropriated, and further ordering the clerk of the court to pay said claim for said attorneys' fees, and costs, out of the money so de-deposited.

In order that the suit may not abate as to the Secretary of the Treasury, inasmuch as said Glass was interested therein solely in his official capacity, and to permit presentation to this Honorable Court of all the points arising on the appeal, it is respectfully requested that the substitution moved be granted.

ALEX. C. KING,
Solicitor General.

MARCH, 1920.

○

IN THE

Supreme Court of the United States

October Term, 1919.

No. 85

Sue Erskine Newman, Administratrix of the Estate of Ursula Ragland Erskine, Deceased; Carter Glass, Secretary of the Treasurer; and John Burke, Treasurer of the United States,

Appellants,

vs.

Ida M. Moyers and Charles F. Consaul, Partners Trading as Moyers and Consaul,

Appellees.

MOTION TO DISMISS APPEAL
of
Carter Glass, Secretary of the Treasury
and
John Burke, Treasurer of the United States,

WITH BRIEF IN SUPPORT OF MOTION,
and
APPELLEES' BRIEF ON MERITS.

MOTION TO DISMISS APPEAL
of
Carter Glass, Secretary of the Treasury, and of John Burke, Treasurer of the United States.

Come now Ida M. Moyers and Charles F. Consaul, partners, trading as Moyers and Consaul, appellees, and respectfully move that the appeal in the above-entitled cause, of Carter Glass, Secretary of the Treasury, and of John Burke, Treasurer of the United States, be dismissed, and as grounds for this motion, respectfully represent:

First. While several assignments of error are made by said appellants, all thereof were abandoned by them in the Court of Appeals, save the single point of the constitutionality of the fee limitation (Section 4) of the act approved March 4, 1915 (38 Stat. 996), and said appellants are thereby estopped to now assign in this Court, errors abandoned in the Court of Appeals.

Second. In the brief filed in this Court by said appellants they have failed to argue or discuss any point save the constitutionality of said section 4 of said act.

Third. In the sole point presented, i. e., the constitutionality of said section 4 of said act of March 4, 1915 (38 Stat. 996), neither said appellants nor the Government of the United States have any financial or other interest or concern, as the interests of said appellants or of the Government would not be in any manner affected by the decision of that point, one way or the other.

By agreement with the Solicitor General, it is understood that with the approval of the Court, this motion may be considered when the case is called on its merits, the right of appellees to insist upon the motion not being waived by now submitting herewith brief upon merits.

Respectfully submitted,

IDA M. MOYERS,

Chas F. Consaul.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

This case comes on appeal from the Court of Appeals of the District of Columbia. That court affirmed the decree of the Supreme Court of said District.

Appellees here were plaintiffs in the trial court. They filed an amended bill against Mrs. Newman, administratrix of Ursula Ragland Erskine, and against McAdoo, Secretary of the Treasury, and Burke, Treasurer of the United States, in the effort to secure payment of a certain attorney fee contracted to be paid them for professional services in prosecuting a claim against the United States. An appropriation for payment of said claim was included in the act approved March 4, 1915, (38 Stat. 962-996.)

The decree entered, (Rec. 19-20) consists of two numbered, separate and distinct paragraphs, their substance being as follows:

1. That the defendants sued as Secretary of the Treasury and as Treasurer of the United States, do pay into the registry of the court the sum of $1,836.66, appropriated to Ursula Ragland Erskine, and that upon making such payment, said defendants be discharged and go hence without day.

2. That plaintiffs (appellees here) do have and recover from Sue Erskine Newman, administratrix of Ursula Ragland Erskine, deceased, the sum of $918.33, with costs of suit; that the Clerk of Court do pay over said sum to plaintiffs, and after deducting his lawful commission, he do pay over the remainder of said sum deposited to said Mrs. Newman, administratrix.

Appellants, Glass, and Burke, Secretary of the Treasury and Treasurer of the United States, have assigned formally eight errors, as follows:

The Court of Appeals erred:

1. In affirming the judgment of the court below.
2. In deciding that the provisions of section 4, of the act of Congress (Public, No. 289, 63rd Congress) are unconstitutional.
3. In refusing to decide that the provisions of section 4, of the act of Congress (Public, No. 289, 63rd Congress) are constitutional.
4. In deciding that the court had jurisdiction to restrain the action of the said William G. McAdoo and John Burke, as Secretary of the Treasury and Treasurer of the United States, respectively, in disbursing the fund.
5. In refusing to decide that the court was without jurisdiction to restrain the action of the said William G. McAdoo and John Burke, as Secretary of the Treasury and Treasurer of the United States, respectively, in disbursing the fund.
6. In deciding that the suit is not one against the United States.
7. In deciding that the situs of the fund was within the jurisdiction of the Court.
8. In refusing to decide that the situs of the fund was not within the jurisdiction of the Court.

As is plain, really but four errors are covered by the foregoing assignments, the first so-called assignment being as nothing, and the others being but restatements of four points.

By their action in the Court of Appeals, however, they are now barred from raising any of these points save one, that covered by assignments 2 and 3. This because they *abandoned* in the Court of Appeals all assignments of error save that covering the constitutionality of the fee limitation forming Sec. 4 of the Act of March 4, 1915, (38 Stat. 996.) Having presented only that single point to the Court of Appeals, they may not

now rightfully urge specifications of error not urged before the Court of Appeals.

That said appellants did abandon before the Court of Appeals all assignments of error save the one mentioned, clearly appears from the opinion of the Court of Appeals, and from the dissenting opinion rendered in that court.

In the opinion of the Court of Appeals (rec. p. 25), it is stated that (emphasis ours):

> *The sole question reserved by this appeal is the constitutionality of section 4* of the act of Congress making the appropriation in question, * * *

In the dissenting opinion (rec. p. 34), it is stated that (emphasis ours):

> *We are asked to declare section 4 of the act of Congress of March 4, 1915, invalid* for want of constitutional power to pass it. The question of Congressional authority then is the question at issue. *No other question is presented by Secretary McAdoo and Treasurer Burke, and they are the only appellants who appear in this court.*

The opinions of the Court of Appeals form a part of the record under the express terms of Sec. 229 of the District of Columbia Code.

Moreover, in the brief filed herein, in behalf of said appellants, they have again failed to present argument upon any point save the constitutionality of Sec. 4, of the Act of March 4, 1915 (38 Stat. 996.) Indeed it is expressly stated in their brief here filed, that (emphasis ours):

> While the defendants in the present case interposed other defenses besides insisting upon the constiutionality of section 4 of said act, and now assign as error the action of the lower court in overruling such defenses, it is evident that the decision of this court in the above mentioned case, sustaining the constitutionality of said section, is determinative of the present case. *The other contentions of the defendants will not, therefore, be urged in this brief;* they are, however, set out in the brief for the appellants in No. 86, Carter Glass et al. vs. De Forrest L. Ormes, administrator.

Reference to a brief filed in a different case assuredly cannot change the fact that said appellants have before this court again abandoned all assignments of error save the constitutionality of section 4 of the Act of March 4, 1915.

Hence, for the purposes of this case, it should be taken that said appellants suggest no error save this single matter of constitutionality. That being so, then nothing else is before this Court.

The case of Montana Railway Co. v. Warren, 137 U. S., 348, is directly in point. In that case, before the Montana supreme court certain assignments of error were filed, being those presented to the trial court as grounds for a motion for a new trial; but some of those assignments were not argued before the territorial supreme court, and on the point here presented, this Court said:

> The only specifications of error were in the statement prepared for the motion for a new trial in the district court. Perhaps nothing more was necessary; and all the questions arising on the trial may have been open to consideration. Be that as it may, the opinion of the Supreme Court

opens by saying: 'There are assignments of error in the statement which are not referred to in appellant's brief, and which will therefore not be considered by this court. Those relied upon are as follows.' It then discusses them, and closes with the statement that 'these are all the errors complained of and relied upon in appellant's brief.' The question now arises whether our inquiry is limited to the matters presented to and considered by that court, or should be broadened to all matters that transpired at the trial. Obviously the former.

This Court further said:

> * * * but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them. Our conclusion, therefore, is that our inquiry in this case is only in relation to the matters presented to and reviewed by the Supreme Court of the Territory.

The same point was presented in case of Old Jordan M. & M. Co. v. Societe Anonyme, etc., 164 U. S. 261, 264, 265, where this Court said:

> As the only error urged in the court below, or noticed in its opinion, turns upon the alleged insufficiency of the proof of the contract set up in the complaint, we shall confine our consideration of the case to that point, notwithstanding that other errors are assigned in this court, and, to some extent, noticed in the brief of plaintiff in error. We have repeatedly held that the failure to present and insist upon errors assigned in the court below constitutes an abandonment or waiver of all the errors so assigned, not vital to the question of jurisdiction, or the foundation of the right; and this court can only be called upon to consider such assign-

ments as are pressed upon the attention, or noticed in the opinion, of the court below.

These decisions were referred to and followed in the recent case of Gila Valley, etc., Co. v. Hall, 237 U. S. 94, 98, 99.

In short, it was squarely held in said cases that assignments of error not pressed before the lower appellate court would not be considered by this court. Appellees merely ask the application to the instant case of that rule.

As will be noted, there is no common interest between Glass and Burke, appellants, and Mrs. Newman, as administratrix. The appellants sued in their official capacity, have utterly no concern in any decree rendered in favor of plaintiffs against the other defendant, sued as administratrix.

The only concern of said official defendants is that they take such action as will fully discharge the obligation of the United States to the payee of said appropriation, and as will fully protect them against other claim.

Payment of the appropriated sum into the registry of the court is merely for the protection of the opposing interests of the plaintiffs and of the defendant sued as administratrix. The mere order for the making of such payment does not deprive said appellants of any title to the fund appropriated. Moreover, in receiving such payment the Clerk acts as receiver of the fund.

That the courts of the District of Columbia are courts of competent jurisdiction is plain because they have jurisdiction of all parties to the suit, all parties defendant having appeared and subjected themselves to the process of the court.

The suit is plainly not one against the Government of the United States, because no attempt is here made to

assert or establish any title or right of plaintiffs, adverse to the right or title of the United States, to any property of any description.

It would seem equally plain that appellants, Glass and Burke, have no more concern in the determination for the purposes of this suit, of the constitutionality of section 4 of the act of March 4, 1915 (38 Stat. 996) than they have in determination of the validity of the fee contract made by appellant, Mrs. Newman, with the plaintiffs herein.

The constitutionality of said section, in whole or in part, like the validity of the fee contract, might be pertinent to the adjudication of the respective rights of plaintiffs and of Mrs. Newman, administratrix; but would not in any wise affect the rights of Messrs. Glass and Burke.

In the case of Lay v. Lay, No. 633, October Term, 1918, decided November 18, 1918, the same section 4 of the act of March 4, 1915, was involved. That case was a three-cornered one. J. F. Lay, et al., the plaintiffs in error, asserted title to the fund appropriated to the estate of their ancestor, Nancy Lay, and also insisted that no more than 20% of the fund appropriated should be paid as an attorney fee for collection of the claim. R. C. Lay asserted that the claim had been assigned by Nancy Lay, to his decedent, and that J. F. Lay, et al., had no interest in the fund, and he also expressed a willingness to permit the attorneys to receive their contract fee of 50%.

The Mississippi Supreme Court adjudged J. F. Lay, et al., to be without interest, in the fund appropriated, and adjudged that the unpaid balance of the attorney fee of 50% be paid by the administrator of Nancy Lay.

To review that judgment, J. F. Lay *et al.* sued out a

writ of error, but R. C. Lay did not, he being satisfied with the judgment rendered.

In disposing of the case this Court, in its memorandum opinion, said that the matter of the assignment of the claim by Nancy Lay was one not involving a Federal question, there being no attempt to enforce the assignment as against the United States, and that it was unnecessary to pass upon the validity of said section 4 of the act of March 4, 1915, because plaintiffs in error had no concern in that question, not being the ones who would pay the attorney fee. *Therefore, the writ of error was dismissed, and the judgment of the Mississippi supreme court was made final although it appeared from the record before this Court, that said attorney fee must be paid from the fund appropriated by said act of March 4, 1915.*

In short, this Court declined to pass upon the propriety of payment from the appropriated fund of the contract attorney fee of 50% at the instance of a party without pecuniary interest in that payment.

In the case at bar, it being evident that Glass and Burke have no concern or interest in the amount to be paid plaintiffs, by defendant, Mrs. Newman, they may not be heard on the constitutionality of the fee limitation section. That being the only point presented by appellants Glass and Burke, it follows that their appeal should be dismissed.

Inasmuch as it has been agreed with the Solicitor General that the motion to dismiss shall be presented when the case is called for argument, appellees will also here present their brief on the merits.

BRIEF ON MERITS.

So far as the merits of the case are concerned, and assuming that the Court may desire to go further than to dismiss the appeal, it is plain that but one point can be deemed before the Court, and that is, the constitutionality of section 4 (fee limitation) in the appropriation act of March 4, 1915 (38 Stat. 996).

As set forth in our brief in support of motion to dismiss the appeal of Glass and Burke, said appellants cannot be considered as having any other than a mere academic interest in the decision of the constitutionality of said provision of the statute. The decree involved does not attempt to settle any questions of controverted title as between **said appellants** and any other parties.

Said appellants allege that the fund appropriated should be paid over by them to the beneficiary named in the act of appropriation, or to Mrs. Newman, her administratrix. The courts below have held, in effect, that the duty of said appellants in the premises will be fulfilled by making the payment to the Clerk of Court, who will act as receiver.

As was said by this Court in Louisiana National Bank v. Whitney, 121 U. S. 284:

> If in the end it shall be found that the fund belongs to the Board of Liquidation, it can be paid from the registry accordingly, notwithstanding the order that has been made. The money when paid into the registry will be in the hands of the Court for the benefit of whomsoever it shall be found to belong.

The Clerk of Court being, for all practical purposes, appointed a receiver to take charge of the fund

appropriated to the decedent of defendant, Mrs. Newman, payment of the appropriated fund to said clerk would be the only legal proceeding, such as would fully protect and exonerate both the appellants, Glass and Burke, and the United States as well. This is made plain by the decision of this Court in U. S. v. Borcherling, Receiver, 185 U. S. 223.

In that case the **failure** of Treasury officials to make payment of an appropriated fund to a receiver appointed by a New Jersey chancery court, and the making of payment to a third person, resulted in said payment being held ineffective to discharge the legal obligation of the Government in the premises, and by direct suit in the Court of Claims, heard by this Court on appeal, the Government was required to pay to the receiver the same amount of money previously wrongfully paid to another, in disregard of the right of the receiver.

In the case at bar, it is clear from reading of the amended bill (Rec. 10), and from the exhibit thereto, being the Findings of Fact of the Court of Claims (Rec. 7-8), that the money appropriated to the decedent of Mrs. Newman, administratrix, was in payment of a constitutional indebtedness of the Government arising from the taking of private property for public use.

That being so, the following language of this Court in U. S. v. Borcherling (185 U. S. 223, 232, 233) is here pertinent:

> Here the government was not the donor of the money to Price, but was its custodian, awaiting its lawful distribution.
>
> As to the contention that the debt due from the United States to Price could not be transferred from Price to the claimant by operation of the

laws of New Jersey, nor by any decree that the courts of New Jersey, operating under such laws, could make, it is sufficient to say that this court has held otherwise.

Cases cited in that opinion were: Vaughan v. Northrup, 15 Pet. 1; Price v. Forrest, 173 U. S. 410.

It is true that in the instant case the Government itself is not a party, but we rely upon the above case to show that payment of the appropriated fund to the Clerk of Court, as directed by the decree herein, would protect both the Secretary of the Treasury and the Treasurer of the United States, and would also fully protect the interests of the United States.

That being too plain to admit of argument to the contrary, what interest have Glass and Burke in this cause; what right of theirs is affected by the decree? They are merely custodians of a certain fund, without interest therein, just as the Louisiana National Bank was custodian in the case of said Bank v. Whitney, 121 U. S. 284, *supra.*

In view of the foregoing, it is insisted by appellees that these appellants, Glass and Burke, have no such interest or concern in the matter of the constitutionality of the fee limitation in the act of March 4, 1915, as to give them any right to be heard on that point.

It is undoubtedly true that some officials of the Treasury Department believe that their action is not at all subject to court control, and the pendency of this appeal is doubtless the result of that belief and contention. In a certain sense it may be said that these officials are *interested* in the case here presented; but in the legal sense of the word "interest," it would seem plain that they have none whatever.

While here denying that there is here any question

properly presented for the consideration of this Court, we will now refer to the decision of this Court in Capital Trust Co. v. Calhoun, 250 U. S. 208, decided June 2, 1919.

As we construe the opinion in said case, it was held therein that Calhoun's fee contract was a valid contract; that he rendered the services requisite to entitle him to the agreed fee; but that, in view of the fee limitation carried by the appropriation act, Calhoun could not secure *from the fund appropriated* more than 20% on account of his contract fee, and the judgment in that case was reversed because that record showed that the estate represented by the Capital Trust Co., as administrator, had no assets other than the sum appropriated.

However, the limitation of the act is without derogation of the right of counsel to secure a decree or judgment for the full amount due under his valid fee contract, *provided* that he does not have *execution out of the fund appropriated,* for more than a 20% fee.

Under this construction of said opinion, and assuming *arguendo* only, that this question is here open, then it would appear that the decree here involved went too far in one particular, and only in one particular, to-wit: in decreeing that payment of the entire contract counsel fee, in excess of 20%, be paid from the appropriated fund.

So far, however, as it was decreed in general terms that plaintiffs do have and recover from Mrs. Newman, administratrix, the contract attorney fee amounting to $918.33, the decree was correct.

So far as it required the sum appropriated to be paid into the registry of the Court, it was correct, or

at least did not conflict with the terms of the statute.

So far as it directed the Clerk to pay over the residue of the fund to Mrs. Newman, as administratrix, the decree was correct.

So far as it required that the agreed counsel fee be paid out of the fund appropriated *to the extent of 20%*, or the sum of $367.33, the decree was correct; but it was incorrect, if at all, only to the extent that it directed payment from the fund appropriated of the *full* amount of the contract fee, amounting to $918.33.

It is here submitted that the existence of a possible doubt as to whether or not a decree or judgment may be made good on execution does not affect the validity of the decree or judgment itself. Decrees and judgments are often entered which cannot be made effective because of lack of assets of the judgment debtor subject to execution; but, once entered, the decree or judgment is none the less valid.

So, in the case at bar, there may exist a *legal* uncertainty as to whether the estate of Mrs. Erskine has assets with which to satisfy the decree here entered, in excess of 20% of the sum appropriated; but that is not a presumption. The presumption, if one is to be indulged in, is that the estate has assets sufficient to fully satisfy the decree. In either event, we know that the statute under consideration permits satisfaction of the decree out of the appropriated fund, up to 20% of the appropriation, and as to any sum beyond 20% it may be that plaintiffs must look to other estate assets. That is immaterial to the validity of the principal part of the decree, however, that plaintiffs do have and recover from defendant, Mrs. Newman, administratrix, $918.33.

In short, the decree was proper in all respects save

in what may be termed, by analogy to the law side of the Court, the matter of *execution*.

This being plain, appellees respectfully submit for the consideration of the Court, the suggestion that, as the right to recover $918.33 is the principal and most important part of the decree, all other parts being merely incidental thereto, it would be only proper that this Court modify the decree to the extent of inserting or adding a proviso that there be paid to plaintiffs out of the fund appropriated, 20% thereof, on account of said decree, and that such payment be received by plaintiffs without prejudice to their right to take such further proceedings as might enable them to realize the remainder of the sum decreed to them, out of any other funds in the hands of Mrs. Newman, administratrix of estate of Mrs. Erskine, deceased.

Then, as modified, the decree properly could be affirmed. As the Court will at once recognize, this is a procedure often followed by appellate courts, in the interest of avoiding unnecessary prolongation of litigation.

In the recent case of Denver v. Denver Union Water Co., 246 U. S. 178, a case involving questions both of law and of fact, this Court proceeded to enter a decree, instead of merely reversing the decree first entered. In that case this Court said:

> The issues were fully heard before the master, all proffered evidence was admitted, the exceptions taken to his findings raise no serious questions of fact, we have before us in the record the evidence and all other materials necessary for judgment, and will simply proceed to do what the district court ought to have done; namely, consider the report and pass upon the exceptions, and make such decree as is equitable in the premises.
>
> * * * * *

The decree of the District Court will be modified so as to overrule, instead of striking out, the exceptions taken by defendants to the master's report, and as so modified it will be affirmed.

Modified and affirmed.

In the instant case, no questions of fact have been presented. In order to bring the decree within the rule announced in Capital Trust Co. v. Calhoun, all that need be done to the decree is to so modify it as to provide that the Clerk of Court shall pay out of the fund to be deposited in the registry of the Court, a sum equal to 20% of the sum appropriated to the decedent, Mrs. Erskine, being the sum of $367.33, with costs of suit; that he then deduct from the fund deposited his lawful commission, and that he then pay over to Mrs. Newman, as administratrix, the residue of the sum so paid in, the payment to plaintiffs of said sum of $367.33 and their acceptance thereof to be without prejudice to the right of plaintiffs to take proper steps to realize the further sum of $551.00 in satisfaction of said decree, out of any other assets or funds of the estate of Mrs. Erskine, deceased.

If the Court believes that the case presents anything requiring its decision, then the action here suggested will dispose of the case finally, leaving nothing further to be done save for plaintiffs below to take what may be regarded as further proceedings on execution, should they be found necessary, which probably they would not be, as the estate of Mrs. Erskine is undoubtedly fully able to respond out of other estate assets, and as the administratrix and her brother and only next of kin, are entirely willing to pay the full agreed counsel fee if permitted by law so to do.

Respectfully submitted,

IDA M. MOYERS,

CHAS. F. CONSAUL,

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SUE ERSKINE NEWMAN, ADMINISTRATRIX of the estate of Ursula Ragland Erskine, deceased; William G. McAdoo, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,

v.

IDA M. MOYERS AND CHARLES F. CONSAUL, partners, trading as Moyers & Consaul.

No. 85.

ON APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO SUBSTITUTE AS ONE OF THE APPELLANTS CARTER GLASS, PRESENT SECRETARY OF THE TREASURY, IN THE PLACE OF WILLIAM G. McADOO, FORMER SECRETARY THEREOF.

Comes now the Solicitor General, and suggesting to the court the resignation of William G. McAdoo as Secretary of the Treasury and the appointment of Carter Glass as his successor, respectfully moves the court that said Carter Glass be made a party appellant in the case in the place and stead of said William G. McAdoo as of December 16, 1918.

This is a suit by appellees, counsel for one Ursula Ragland Erskine (intestate of appellant Newman) in litigation in the Court of Claims, seeking, among other things, to establish an equitable lien for attorneys' fees upon the one-third interest of said administratrix Newman in a fund of $5,510 appropriated by Congress in satisfaction of a judgment of the Court of Claims in favor of said Ursula Ragland Erskine and her coclaimants. The appeal is prosecuted from a decision of the Court of Appeals of the District of Columbia affirming a decree ordering the payment by the Secretary of the Treasury and the Treasurer of the United States into the registry of the court of said one-third interest of appellant Newman as administratrix in the fund appropriated, and further ordering the clerk of the court to pay said claim for said attorneys' fees, and costs, out of the money so deposited.

In order that the suit may not abate as to the Secretary of the Treasury, inasmuch as said McAdoo was interested therein solely in his official capacity, and to permit presentation to this Honorable Court of all the points arising on the appeal, it is respectfully requested that the substitution moved be granted.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SUE ERSKINE NEWMAN, ADMINISTRATRIX of the estate of Ursula Ragland Erskine, deceased, David F. Houston, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,

v.

IDA M. MOYERS AND CHARLES F. CONSAUL, partners trading as Moyers & Consaul.

No. 85.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

On behalf of the appellants, the Secretary of the Treasury, and the Treasurer of the United States, we desire to reply very briefly to the three grounds for the dismissal of the appeal set up in the appellees' motion.

16795—20

I.

These Appellants did not abandon in the Court of Appeals all points save the constitutionality of the fee limitation in Section 4 of the Act of March 4, 1915.

The Secretary of the Treasury and the Treasurer of the United States moved the Supreme Court of the District of Columbia to dismiss appellees' bill, not only on the ground of said fee limitation, which was alleged to be constitutional, but also upon the following additional grounds:

(*a*) The situs of the fund in question is not within the jurisdiction of the court.

(*b*) The court is without jurisdiction to restrain said officers in disbursing said fund.

(*c*) That said officers have no individual interest in the controversy; that the relief sought against them is in their official capacity only; that therefore the suit is in substance one against the United States and the property thereof, and is not within the jurisdiction of the court. (Rec. 18.)

A decree having been entered overruling this motion and ordering the officials of the Treasury Department to pay the money involved into the registry of the court, and providing for the recovery therefrom by the plaintiffs of a sum in excess of 20 per cent thereof (Rec. 19–20), an appeal was taken to the Court of Appeals and the failure of the Supreme Court to sustain the several points set up in the motion to dismiss was assigned as error,

these several points being stated in said assignment. (Rec. 21–22.)

When it came to the actual presentation of the appeal in that court, however, appellants were confronted with the fact that all points save the constitutionality of the fee limitation in the act of Congress were foreclosed by the former decisions of said court.

See *Sanborn* v. *Maxwell*, 18 D. C. App. 245.
Roberts v. *Consaul*, 24 D. C. App. 551.
Bryan v. *Curtis*, 26 D. C. App. 95.
Jones v. *Rutherford*, 26 D. C. App. 114.

The appellants, therefore, did not go through the futility of urging these points upon the Court of Appeals.

The points were, however, reserved by the assignment of errors and were apparent on the face of the record, and it can not be said that they were abandoned because not actively urged on a court which had many times decided them adversely.

These points are not stated in the opinion of that court; that court says, that the assignments of error only reserved that point—evidently treating the others as concluded by former decisions.

II.

Said points have not been waived in this Court.

The several objections to the jurisdiction set up in the motion to dismiss and in the assignment of errors in the Court of Appeals are repeated in the assignments of error in this court. (Rec. 42.)

Simultaneously with the appeal in this case the Government took an appeal in the case of *McAdoo* (now Houston) v. *Ormes*, which is No. 86 on the docket at this term, and which has already been argued and submitted.

The latter case involved all the points of the present case save the constitutionality of the act of 1915, and said points were argued in the Government's brief in that case. Rather than repeat the same argument in another brief at the same term, the Government in its brief in the present case adopted said arguments by reference.

If there is anything in the manner in which this was done which would indicate that said points were abandoned, we now disavow any such intention, and ask the court to consider said points and the argument in the brief in No. 86 as if it were set out herein.

III.

Both these appellants and the Government have an interest in the suit.

The effect of the decree in the present case is to compel the Secretary of the Treasury and the Treasurer of the United States to pay into the registry of the court a fund which they were authorized and directed by Congress to pay to a particular payee, in order that said fund may be disbursed in a manner forbidden by the act of Congress.

Having been thus impleaded it was open to the appellants in the lower court to interpose every available defense to the suit. Certainly the defense

that the relief asked for was prohibited by an act of Congress was open to them. So also was the defense that they could not pay the money to any other person than the one named in the appropriation. And the defense that the suit is in substance one against the United States is one which these officials could not themselves voluntarily waive. *Carr* v. *United States*, 98 U. S. 433.

It is submitted, therefore, that the appellants, the Secretary of the Treasury and the Treasurer of the United States, have the right to insist on all the assignments of error on the present appeal, and that the motion to dismiss should be denied.

ALEX. C. KING,
Solicitor General.
A. F. MYERS,
Attorney, Department of Justice.

MARCH, 1920.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SUE ERSKINE NEWMAN, ADMINISTRATRIX of the Estate of Ursula Ragland Erskine, Deceased, Carter Glass, Secretary of the Treasury, and John Burke, Treasurer of the United States, Appellants, *v.* IDA M. MOYERS AND CHARLES F. CONSAUL, Partners Trading as Moyers and Consaul.	No. 85.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS CARTER GLASS AND JOHN BURKE.

STATEMENT OF THE CASE.

This is a suit in equity by the appellees (hereinafter called plaintiffs) against Sue Erskine Newman, a resident of Virginia, the Secretary of the Treasury, and the Treasurer of the United States to control the payment, receipt, and distribution of a sum of money appropriated by Congress in satisfaction of a claim against the United States.

147826—19

Briefly stated, plaintiffs alleged that by written contract dated April 26, 1907, they were retained by Ursula Ragland Erskine and her co-claimants as attorneys to prosecute a claim against the United States for private property taken during the Civil War, and that said contract provided for the payment of a fee equal to 50 per cent of the amount recovered. (Bill of complaint, rec. 10–15.)

Plaintiffs further alleged that they diligently prosecuted said claim to judgment in the Court of Claims; and that thereafter Congress, by the act of March 4, 1915 (38 Stat. L., 962), appropriated the sum of $5,510 in satisfaction of the claim of Mrs. Erskine and her two co-claimants, being the amount found due by the Court of Claims.

The bill prayed, among other things, that the Secretary of the Treasury and the Treasurer of the United States be restrained from paying Defendant Newman the amount of Mrs. Erskine's share of the appropriation; and that they be required to pay the same into the registry of the court in order that it might be charged with the 50 per cent fee provided by the above contract.

It was not alleged that the defendant, Newman, purposes to defraud plaintiffs of a fee amounting to 20 per cent of the amount recovered as allowed by statute.

The controversy turned upon the provision of section 4 of said act of March 4, 1915, limiting the fees to be paid from the appropriation, or received therefrom by the attorneys for claimants, to 20 per cent of

the amount appropriated. This provision, which was declared by plaintiffs to be unconstitutional and void, and by defendants to be a valid act of legislation, reads as follows:

> That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered or advances made in connection with said claim.
>
> It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold, or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding $1,000. (38 Stat. L. 996.)

The Supreme Court of the District of Columbia overruled defendants' motion to dismiss and entered a decree substantially as prayed. (Rec. 19-20.) The Court of Appeals of the District (Justices Van Orsdel and Robb concurring and Chief Justice Smyth dissenting) affirmed the decree, holding the above provision to be unconstitutional. (Rec. 43-40; 47 D. C. App. 102.) The suit was begun against William G. McAdoo as Secretary of the Treasury, for whom Carter Glass was substituted by order of this court on October 13, 1919.

SPECIFICATION OF ERROR.

The Court of Appeals erred:

1. In deciding that the provisions of section 4 of the act of March 4, 1915, are unconstitutional.

2. In deciding that the court had jurisdiction to restrain the action of the Secretary of the Treasury and the Treasurer of the United States in disbursing said fund.

3. In deciding that the suit is not one against the United States.

4. In deciding that the fund was within the jurisdiction of the court. (Rec. 42.)

In *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208, decided June 2, 1919, this court had before it the very provision in question. That case involved a cross petition by a firm of attorneys in a proceeding in equity against the Capital Trust Company, as administrator, for an accounting. The cross petition contained allegations similar to those in the case at the bar; that the petitioners had been retained by the decedent to prosecute a claim against the United States under a contract providing for a fee amounting to 50 per cent of the amount collected; that said claim had been prosecuted to judgment in the Court of Claims and appropriation therefor made by the act of March 4, 1915; and that the amount of said appropriation less 20 per cent (received by petitioners under protest) was in the hands of said Trust Company, as administrator; and praying judgment for the remainder of their fee under said contract.

This court, therefore, was squarely confronted with the question as to the validity of section 4 of the act of March 4, 1915, and it was upon this question alone that the case was decided. Mr. Justice McKenna, in putting aside other contentions advanced in the case, said:

> We, however, need not dwell upon the distinctions (their soundness may be disputed) nor upon the contentions based upon them,

> because, as we have said, we consider the other proposition; that is, the power of Congress over the appropriated money and the limitation of payment out of it to an agent or attorney to 20 per cent of the claim, to be the decisive one. (P. 217.)

And in upholding the provisions of the act Mr. Justice McKenna, after summarizing the opposing contentions, spoke as follows:

> But there are other elements to be considered; there is the element of the condition Congress imposed on the subject matter of the controversy regarded as a condition of its grant. Relief could only be had through legislation. * * * A defect of remedy remained even after the court had been thus invoked and had reported the amount and facts of the claim. Further legislation was necessary, but it could not have been compelled; it was optional, not compulsory; and it would seem to require no argument to convince that the terms of its enactment must be taken as expressed and the relief it granted accepted with the condition imposed upon it. * * * The contention is that this can not be done, or, to put it another way, that the appropriation, though it could not be compelled, was yet subservient to the contract of Calhoun. * * * (Pp. 218–219.)
>
> The contention has no legal basis, and it may be said that it has no equitable one. Neither the justice nor the policy of what sovereignty may do or omit to do can be judged from partial views or particular instances. * * *

Whatever might have been the moving considerations, the power exercised must be sustained. (Pp. 219–220.)

While the defendants in the present case interposed other defenses besides insisting upon the constitutionality of section 4 of said act, and now assign as error the action of the lower court in overruling such defenses, it is evident that the decision of this court in the above-mentioned case, sustaining the constitutionality of said section, is determinative of the present case. The other contentions of the defendants will not, therefore, be urged in this brief; they are, however, set out in the brief for the appellants in No. 86, *Carter Glass et al.* v. *De Forrest L. Ormes, administrator.*

CONCLUSION.

It is submitted that the decree in this case should be reversed and the case remanded to the Supreme Court of the District of Columbia with directions to dismiss the bill.

ALEX. C. KING,
Solicitor General.
A. F. MYERS,
Attorney, Department of Justice.

NOVEMBER, 1919.

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NEWMAN, ADMINISTRATRIX OF ERSKINE, ET AL. *v.* MOYERS ET AL., PARTNERS, TRADING AS MOYERS & CONSAUL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 85. Argued March 11, 1920.—Decided May 17, 1920.

Section 4 of the Omnibus Claims Act of March 4, 1915, c. 140, 38 Stat. 962, limiting the amount of fees collectible by attorneys in respect of the claims therein appropriated for, is valid. P. 185. *Calhoun* v. *Massie*, *ante*, 170.

A suit by attorneys against their client and Treasury officials to enforce a contract for fees made unlawful by an act of Congress is an attempt to use the court for an illegal purpose and should be dismissed by the court, *sua sponte* if necessary, and it is immaterial whether the Treasury officials or the Government have any interest entitling them to appeal. Pp. 184–185.

In a suit by attorneys against their client and Treasury officials to enforce a contract for fees made unlawful by an act of Congress, wherein the client failed to prosecute her appeal to this court from a decree against her, *held*, that this court might open the record and reverse the decree or dismiss the appeal for want of prosecution, leaving the court below free to take appropriate action to prevent itself from being used as an instrument of illegality. P. 185.

App. D. C. 102, reversed in part; appeal of Newman, administratrix, dismissed for want of prosecution.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson, with whom *The Solicitor General* and *Mr. A. F. Myers* were on the brief, for appellants.

Mr. Charles F. Consaul, with whom *Ida M. Moyers* was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

By the Omnibus Claims Act of March 4, 1915, c. 140, 38 Stat. 962, 963, discussed in *Calhoun* v. *Massie*, decided this day, *ante*, 170, Ursula Ragland Erskine became entitled to receive from the Secretary of the Treasury the sum of $1,836.66. Long before that date she and the firm of Moyers and Consaul, attorneys, had entered into a contract for the prosecution of her claim against the Government. The contract provided that the attorneys should receive an amount equal to fifty per cent. of the sum collected. Its terms and the services rendered were, in substance, identical with those set forth in *Calhoun* v. *Massie*. In reliance upon § 4 of the above act, Mrs. Erskine refused to pay or assent to the payment to the attorneys of an amount greater than twenty per cent. of the appropriation; and the Treasury officials were proposing to issue a warrant for twenty per cent. thereof to

the attorneys and another for the balance to her. Moyers and Consaul insisted that the provision of the act limiting fees of attorneys to twenty per cent. was invalid; and they brought this suit in the Supreme Court of the District of Columbia against Mrs. Erskine, the Secretary of the Treasury and the Treasurer of the United States to recover the full fifty per cent. As in *McGowan* v. *Parish*, 237 U. S. 285, the plaintiffs prayed that they be declared entitled to recover from Mrs. Erskine the amount claimed; that the issuance to and the collection by her of any amount from the Government be enjoined; and that either the whole amount be paid into the Registry of the court, or that a receiver be appointed who should collect from the Government the whole amount and pay therefrom to plaintiffs an amount equal to fifty per cent. of the collection. Mrs. Erskine died soon after the filing of the bill, whereupon Sue Erskine Newman, the administratrix of her estate, was made defendant.

The Secretary of the Treasury and the Treasurer moved to dismiss the bill of complaint, among other reasons, on the ground that collection of more than twenty per cent. was prohibited by § 4, and that the limitation thereby imposed was a valid exercise of congressional power. Sue Erskine Newman, as administratrix, moved to dismiss on the same ground, among others. The motions were overruled; and the court entered a decree directing payment of the money into court, ordering that plaintiff recover from the administratrix an amount equal to fifty per cent. of the collection from the Government, and directing that this sum be paid out of the funds to be so paid into court. From the decree for plaintiffs entered by the Supreme Court of the District of Columbia, all the defendants appealed to the Court of Appeals of the District of Columbia; and when the latter affirmed the decree of the lower court, all the defendants joined in the appeal to this court. The Honor-

able Carter Glass, upon becoming Secretary of the Treasury, was substituted for the Honorable William G. McAdoo; and the further substitution of the Honorable David F. Houston was made when he became Secretary of the Treasury. The appellees now move to dismiss the appeals of the Secretary of the Treasury and the Treasurer of the United States on the ground that neither they nor the Government have any pecuniary or other interest in the suit. They also move to dismiss the appeal of the administratrix on the ground that she did not formally enter her appearance in this court nor take any part in the proceedings here.

The merits of the former motion we have no occasion to consider, for the following reason: Section 4 of the act limited the compensation which the attorneys may collect or receive to twenty per cent. The act is valid. *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208; *Calhoun* v. *Massie*, *supra*. The plaintiffs were seeking the aid of the courts to recover monies which an act of Congress prohibited them from collecting or receiving. If the bill had not alleged that this act was invalid it would have been the duty of the lower court to dismiss the bill even if none of the defendants had raised any objection to the maintenance of the suit. *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 267; *Lee* v. *Johnson*, 116 U. S. 48, 52; *Coppell* v. *Hall*, 7 Wall. 542, 558. The Secretary of the Treasury and the Treasurer of the United States did make such objection. The overruling of it in the courts below was error. The judgment must be reversed and the cause remanded with directions to dismiss the bill as to them.

The fact that the administratrix did not persist in her appeal should not result in affirmance of the judgment as to her. In *Montalet* v. *Murray*, 3 Cranch, 249, Mr. Chief Justice Marshall "stated the practice of the court to be, that where there is no appearance for the plaintiff in error, the defendant may have the plaintiff called, and

dismiss the writ of error; or may open the record, and pray for an affirmance." This practice is still in force under Rules 9 and 16 of this court. *Todd* v. *Daniel*, 16 Pet. 511; *Hurley* v. *Jones*, 97 U. S. 318; *The "S. S. Osborne,"* 105 U. S. 447, 450–1. It is applicable to one of several joint appellants who fails to perfect his appeal. *Yates* v. *Jones National Bank*, 206 U. S. 158, 166, 181.

If the appellee had asked for an affirmance it is clear that it must have been denied because of the illegal purpose of the suit. But the court might go further. Since of its own motion it might dismiss this appeal (*Hilton* v. *Dickinson*, 108 U. S. 165, 168), and since on dismissing it a mandate to the lower court might issue (*United States* v. *Gomez*, 23 How. 326, 330), this court might also of its own motion entertain the alternative to dismissal spoken of by Mr. Chief Justice Marshall,—i. e., open the record. If it did so and perceived that the court was being used to attain an illegal result there would be power to reverse the decree and remand the cause with instructions to dismiss the bill. But in the present case such a course is not necessary. The appellees have asked not for an affirmance, but for a dismissal, of the appeal of the administratrix. A dismissal for want of prosecution will remit the case to the lower court in the same condition as before the appeal was taken; and the lower court will then be free to take appropriate action to prevent itself from being used as an instrument in illegality. *United States* v. *De Pacheco*, 20 How. 261; *United States* v. *Gomez*, 23 How. 326, 339–340.

Decree reversed as to appellants Houston and Burke and cause remanded with directions to dismiss the bill as to them.

Appeal of Newman, Adm'x, dismissed for want of prosecution, and case remanded for further proceedings in conformity with this opinion.